Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

MARY ANNA RIVET, MINNA REE WINER, EDMOND G. MIRANNE, and EDMOND G. MIRANNE, JR.,

Petitioners,

versus

REGIONS BANK, WALTER L. BROWN, JR., PERRY S. BROWN, and FSA, L.L.C.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Is a federal court judgment "self-executing" such that a state statutory scheme for the domestication and enforcement of such judgments may be completely disregarded?

(2) Does the Bankruptcy Code completely preempt the Louisiana law of domestication and enforcement of foreign judgments, including those rendered by a bankruptcy court?

(3) May the All Writs Act and the Anti-Injunction Act be used to:

(a) prevent the "relitigation" of state law issues concerning the proper domestication and enforcement of a federal judgment, which could not have been "actually decided" in the prior federal action; and

(b) provide an *ad hoc* remedy for those who failed to comply with an existing state statutory procedure available to them, to enforce their federal judgment?

LIST OF PARTIES

The names of all Petitioners who are parties to the proceedings in the Court whose judgment is sought to be reviewed here appear in the caption of the case. With respect to the Respondents: Regions Bank of Louisiana is a wholly-owned subsidiary of Regions Financial Corporation. FSA, L.L.C. is a Louisiana Limited Liability Company. Petitioners are unaware of the complete list of its principals. To the best of Petitioners' knowledge and belief, the following persons are among the principals of FSA, L.L.C.:

1. Burnam Storage Associates
2. The Burnam Companies
3. CMC, A Division of Burnam Companies
4. Cris Burnam
5. Tim Burnam
6. Roland von Kurnatowski

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TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

MAY IT PLEASE THE COURT,

Petitioners, Mary Anna Rivet, Minna Ree Winer, Edmond G. Miranne, and Edmond G. Miranne, Jr., respectfully pray that a Writ of Certiorari issue to review the Opinion and Judgment of the United States Court of Appeals for the Fifth Circuit entered in this matter on August 22, 2000.

OPINIONS BELOW

The Opinion and Judgment of the three-judge panel of the United States Court of Appeals for the Fifth Circuit was entered August 22, 2000, and is reprinted in the Appendix to this Petition at pages App. 1 through App. 25. The Judgment and Order and Reasons of the United States District Court for the Eastern District of Louisiana, entered April 14, 1999, are reprinted in the Appendix to this Petition at pages App. 26 through App. 39. For briefing purposes, the term "opinion below" will refer to the Fifth Circuit's opinion.

STATEMENT OF JURISDICTION

The judgment of the oral argument at the United States Court of Appeals for the Fifth Circuit was entered on August 22, 2000, affirming in part and reversing in part the Order and Reasons of the United States District Court for the Eastern District of Louisiana, dated April 13, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following provisions of the Constitution and the United States Code:

U.S. Const., Amendment X:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

U.S. Const., Amendment XI:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Title 28 U.S.C. § 1651(a):

> (A) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

Title 28 U.S.C. § 2283:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

This case also involves the following statutes and codal provisions of the State of Louisiana, which have been reproduced below in pertinent part:

Louisiana Revised Statutes, 13:4241:

> "foreign judgment" means any judgment, decree, or order of a court of the United States . . . which is entitled to full faith and credit in this state.

Louisiana Revised Statutes, 13:4242:

> A copy of any foreign judgment authenticated in accordance with an act of Congress or the statutes of this state may be annexed to and filed with an *ex parte* petition complying with Code of Civil Procedure Article 891 and praying that the judgment be made executory in a court of this state. The foreign judgment shall be treated in the same manner as a judgment of a court of this state.

Louisiana Code of Civil Procedure, Article 2541 A:

> A party seeking recognition or execution by a Louisiana court of a judgment or decree of a court of the United States . . . may either seek enforcement pursuant to R.S. 13:4242, *et seq.*, or bring an ordinary proceeding against the judgment debtor in the proper Louisiana Court to have the judgment or decree recognized and made the judgment of the Louisiana court.

Louisiana Revised Statutes, 9:5031:

> No lien or privilege shall be canceled, removed from the public records, or in any manner affected by any public or private sale of property subject thereto in any succession, liquidation, insolvency, receivership, bankruptcy, or partition proceeding. . . . However, the provisions of this section shall not apply to the execution of judgments governed by Book IV of the Louisiana Code of Civil Procedure, Articles 2631, *et seq.*

Louisiana Revised Statutes, 9:5251:

> No conventional or judicial mortgage, or chattel mortgage, . . . shall be canceled, removed from the public records, or in any manner affected by any public or private sale of property subject thereto in any succession, liquidation, insolvency, receivership, bankruptcy, or partition

> proceeding. . . . The provisions of this section shall not apply to the execution of judgments governed by Book IV of the Louisiana Code of Civil Procedure, Article 2251, *et seq.*, or to judicial sales in executory proceedings under the Louisiana Code of Civil Procedure, Article 2631, *et seq.*

STATEMENT OF THE CASE

I. Basis for Federal Jurisdiction in the Court of First Instance

This action was originally commenced by Respondents in the United States District Court for the Eastern District of Louisiana pursuant to The Anti-Injunction Act, 22 U.S.C. §2283, and The All Writs Act, 22 U.S.C. §1651.

II. Statement of the Facts[1]

III. Course of proceedings and disposition in the Court below.[2]

In August of 1986, the United States Bankruptcy Court for the Eastern District of Louisiana ordered that

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[1] The facts underlying this case are exceedingly involved and complex. They have been described in detail in the opinion below (App. at 2-8), as well as in *Rivet v. Regions Bank of Louisiana*, 522 U.S. 470, 118 S.Ct. 921, 139 L.Ed.2d 912 (1998) and *Rivet v. Regions Bank of Louisiana*, 108 F.3d 576 (5th Cir. 1997), *rev'd*, 522 U.S. 470. For a complete understanding of the facts, the attention of the Court is respectfully directed to these sources. In the interest of brevity and clarity, only those facts will be recited herein which are essential to an understanding of the issues sought to be reviewed.

[2] Because the underlying facts are so inextricably intertwined with the procedural history of the case, and in the interest of clarity, these sections are stated together.

certain real property of a bankrupt estate be sold at auction free and clear of liens and encumbrances, pursuant to 11 U.S.C. § 363(f), despite the fact that the total value of the encumbrances on the property exceeded the minimum authorized auction price. *In re Tulane Hotel Investors Limited Partnership*, U.S.B.C., E.D.La., Case No. 84-02145 (1984) (hereinafter "THILP Bankruptcy"). Petitioners herein held a collateral (second) mortgage on the property ("the Mortgage"). App. at 2-4. The corporate predecessor of Respondent Regions Bank of Louisiana ("Regions") held the first mortgage and bought the property at the auction sale by means of a credit bid against its mortgage. App. at 4.[3]

Louisiana State law has provided at all pertinent times, in essence, that no security interest in real property in Louisiana may be extinguished or "in any manner affected" by a bankruptcy sale, unless and until the bankruptcy court's order (judgment) has been domesticated and enforced in Louisiana through the State's statutory procedure for the enforcement of foreign (including federal) judgments. *See* La. R.S. 9:5031 and 9:5251, La. C.C.P., Art. 2541 A, and La. R.S. 13:4241 and 13:4242. The federal bankruptcy order was never domesticated and enforced in Louisiana, and the Mortgage remained validly recorded in the State's public records at all relevant times. App. at 4.

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[3] The sale price, as authorized by the bankruptcy court, was but a fraction of the total value of the liens and encumbrances on the property. Thus, Petitioners never received anything of value in return for their Mortgage, as is required by 11 U.S.C. § 363(f). Similarly, there was no finding by the bankruptcy court that the Mortgage was invalid, or that it should be invalidated under any other provision of the bankruptcy code.

The property was resold to the predecessor of Respondent FSA, L.L.C. in 1993, without satisfying the debt secured by the mortgage or providing for the protection of the mortgage rights. App. at 4-5. The Mortgage was re-inscribed by the Recorder of Mortgages in 1994, and this re-inscription was certified by the Recorder in 1995, in a Mortgage Certificate which was filed as part of a joint appendix in this Court in 1997 in connection with *Rivet v. Regions Bank of Louisiana*, 522 U.S. 470, 118 S.Ct. 921, 139 L.Ed.2d 912 (1998) (hereinafter cited as "*Rivet I, supra*, 522 U.S. at").

On December 29, 1994, all Petitioners commenced suit against all Respondents in State court to foreclose on the Mortgage, and for damages for destroying their mortgage rights. *Rivet v. Regions Bank of Louisiana*, Case No. 94-20050 (hereinafter "the State Action"). On February 3, 1995, the Respondents removed the action to the United States District Court for the Eastern District of Louisiana. Petitioners contested removal jurisdiction and, after extensive motion practice, a panel of the United States Court of Appeals upheld the District Court's assumption of removal jurisdiction. *Rivet v. Regions Bank of Louisiana*, 108 F.3d 576 (5th Cir. 1997). A Petition for rehearing *en banc* was denied, and this Court granted *Certiorari*. (118 S.Ct. 31). It was determined that there was no removal jurisdiction, and the case was ultimately remanded to state court on June 30, 1998. *Rivet I, supra*, 522 U.S. at 470, *remand* 139 F.3d 512.[4]

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[4] The case was actually remanded twice by the district court. Included in the district court's first remand order were two injunctions: one directing the State court to dismiss the action and one directing the Recorder of Mortgages to cancel

This action was then commenced by Respondents in federal court on August 7, 1998, under the relitigation exception to the Anti-Injunction Act, 28 U.S.C. § 2283, and the All Writs Act, 28 U.S.C. § 1651, seeking to enjoin the prosecution of the State action, essentially on the theory that the bankruptcy judgment and order had conclusively extinguished the Mortgage by operation of law, and with no necessity of domestication and enforcement of the bankruptcy court's order and judgment under State law. App. at 6. Petitioners resisted the injunction, contending in essence that:

1. The federal bankruptcy order was required to be domesticated and enforced in Louisiana, pursuant to State law and procedure, before it could be effective to actually extinguish Petitioners' mortgage rights, as a matter of both federal and state law.

2. Since the federal order was required to be enforced, the facts and circumstances of its non-enforcement, whether governed by federal or state law, must, by definitional necessity, have occurred after the entry of the federal order, and, therefore, could not have been "actually decided" in the prior federal (bankruptcy) action, as is required under the relitigation exception to the Anti-Injunction Act.

Despite these arguments, the District Court, in 1999, entered both preliminary and permanent injunctions against the prosecution in State court of the mortgage

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and erase the Mortgage inscription. These injunctions were vacated by the Court of Appeals on a Writ of Mandamus (opinion unpublished), and the case was ultimately remanded on June 30, 1998.

foreclosure action (App. at 26-27), and the Court of Appeals affirmed the permanent injunction. App. at 25.[5]

The Mortgage remains validly recorded in the mortgage records of Orleans Parish, and the State action remains pending in the State court.

IV. The Opinion Below.

The entire portion of the opinion below relevant to this Writ Application is approximately nine pages long. App. at 9-17. In essence, the Court creates a novel form of self-executing judgment, which, for briefing purposes, Petitioners will refer to as the "super judgment". This judicially-created "super judgment" has the inherent power to sweep aside, by operation of law and upon its very entry: (a) any necessity for enforcement of the judgment; (b) all state and federal laws concerning domestication and enforcement of judgments, including the decisions of this Court; as well as (c) all state laws regulating real property interests. The force of such a "super judgment" may be seen from the following statements contained in the opinion below:

> At the heart of [Petitioners'] argument is the assumption that the bankruptcy court's orders were not *self-executing*.
>
> [T]he Bank *did not need to take further steps to "execute"* the bankruptcy court's orders.

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[5] While the case was pending in State court following remand, default judgments were entered against Respondents Walter L. Brown, Jr., Perry S. Brown, and FSA, L.L.C. App. at 17-25. The district court also entered preliminary and permanent injunctions against enforcement of these judgments. App. at 26-27. These injunctions, however, were vacated by the Court of Appeals. App. at 25. Petitioners do not seek review of this portion of the decision of the Court of Appeals.

> If a bankruptcy court's orders authorizing and approving a sale free and clear of liens were not *self-executing*, it would seemingly be impossible to have the liens attach to the sale proceeds.

App. at 12-15 (emphasis added).

This approach, however, is fatally flawed under the facts and circumstances at bar for several reasons:

(1) The opinion below finds no precedential support for this view in any appellate opinion.

(2) The opinion below simply ignores this Court's decisions regarding the enforcement of all federal judgments.

(3) With no preemption analysis, the opinion below implicitly holds that the Bankruptcy Code preempts Louisiana's statutory scheme for the domestication and enforcement of federal judgments in Louisiana (including bankruptcy judgments), as well as Louisiana statutes regulating real property interests.

(4) The opinion impermissibly infringes on Louisiana's State sovereignty by destroying the integrity of the State's public records.

ARGUMENT FOR ALLOWANCE OF THE WRIT

I. Summary of Argument.

The opinion below holds in essence that, because the bankruptcy court's order and judgment was "self-executing", it had the effect, immediately upon entry, of negating the Mortgage under State law. Louisiana law, however, expressly holds to the contrary and provides that such judgments have no effect whatsoever on mortgages, until State domestication and enforcement procedures are followed. Thus, in effect, the opinion creates a form of "super judgment" which has the power to sweep aside all State laws governing enforcement of

judgments as well as those State laws regulating real property interests, effectively preempting those State laws, without even undertaking a preemption analysis. Indeed, this new species of judgment sweeps aside even the necessity of enforcing the judgment at all. In doing so, this holding ignores two crucial circumstances:

1. A Louisiana statute mandates that certain real property interests in Louisiana, including mortgages such as the one at issue, may not be "in any manner affected" by a sale in bankruptcy unless and until the bankruptcy order and judgment has been domesticated and enforced in Louisiana, pursuant to State statutory procedure. (Sections II A & B, *infra*)

2. The bankruptcy order and judgment in issue was never domesticated and enforced in Louisiana, and the Mortgage remained duly recorded in the State public records at all relevant times. (Sections II B & C, *infra*)

As a result of ignoring these two circumstances, the opinion below conflicts with this Court's precedent in at least three ways:

(1) All judgments must be enforced. No court has the power to decree the automatic enforcement of its own judgments. These are among the most fundamental principles of American jurisprudence, and this Court has firmly reiterated them as recently as 1998. Moreover, under our federal system, all federal judgments must be enforced in accordance with the law of the state in which enforcement is sought. This cardinal principle of our federalism was also re-confirmed by this Court in 1998. The opinion below completely ignores these principles, and declined even to address this Court's decisions in this regard. (Section II A, *infra*)

(2) The opinion below also conflicts with this Court's precedents, as well as the Fifth Circuit's own

prior decisions, interpreting the doctrine of preemption. The Louisiana statutory scheme clearly provides that the Mortgage has not been affected in any way, because the bankruptcy order and judgment was never domesticated and enforced in Louisiana. This body of State law cannot simply be ignored by the federal courts, as the opinion below would have it. For the order and judgment at issue to supersede the State law, it must be held that the Bankruptcy Code preempts the Louisiana law, and this holding must be made after a rigorous preemption analysis, which the opinion below simply does not make. (Section II, B, *infra*)

(3) Further, the "super judgment" created by the opinion below also violates this Court's precedents concerning state sovereignty under both the Tenth and Eleventh Amendments. The State statutory scheme at issue is undeniably one of the ways in which Louisiana regulates the real property interests within her borders. At a minimum, this Court's precedents ceding to the state, under the Tenth Amendment, the right to control real property interests, should have counseled the lower courts against enjoining the courts of State of Louisiana from proceeding with a mortgage foreclosure action.

This same result also obtains under this Court's jurisprudence interpreting the Eleventh Amendment. In addition, these precedents do not permit a federal court simply to sweep aside the State's statutory machinery for the enforcement of judgments. The Attorney General of Louisiana intervened in the Fifth Circuit on behalf of the State, as *Amicus Curiae*, and maintained that Louisiana could not accept such a result. The opinion below, however, gave short shrift to the State's concerns. (Section II C, *infra*)

(4) Finally, by definitional necessity, the facts and circumstances surrounding the enforcement, or non-enforcement, of any judgment, and the effects thereof, could not have been actually decided in the prior federal action which resulted in the judgment and which forms the jurisdictional predicate of an Anti-Injunction Act lawsuit. Thus, this Court's precedents applying the relitigation exception to the Anti-Injunction Act are ignored by the opinion below. Moreover, the opinion below also conflicts with this Court's precedents concerning application of the even more basic and fundamental All Writs Act, because there was a specific State statutory procedure at hand, the Louisiana enforcement machinery, through which Respondents could have achieved the result they sought: cancellation and erasure of the Mortgage. (Section II D, *infra*)

II. The Decision Of The Court Of Appeals Conflicts With Decisions Of The Supreme Court And With Prior Decisions Of The Fifth Circuit.

A. The Opinion Below Conflicts With This Court's Decisions Regarding The Enforcement Of Federal Judgments.

This Court has made it clear that *all* federal judgments *must be enforced* according to the law of the state in which enforcement is sought. *See Baker by Thomas v. General Motors Corp.*, 522 U.S. 222, 118 S.Ct. 657, 664-665, 139 L.Ed.2d 580 (1998) ("[e]nforcement measures *do not travel with the . . . judgment* as preclusive effects do; *such measures remain subject to the even-handed control of forum law*") (Ginsburg, J.) (Emphasis added), *citing, McElmoyle ex rel. Bailey v. Cohen*, 13 Pet. 312, 325, 10 L.Ed. 177 (1839) (judgment may be enforced only as "laws [of enforcing forum] may permit"). *See also* Restatement (second) of

Conflicts of laws § 99 (1969) ("The local law of the forum determines the methods by which a judgment of another state is enforced").

The opinion merely decrees that the bankruptcy order and judgment were "self executing". App. at 12-15. The opinion simply ignores not only the *Baker* case, but also the entire body of law concerning the enforcement of judgments. In his concurring opinion in *Baker*, Justice Scalia made it absolutely clear that *all judgments must be enforced*, stating:

> The . . . judgment " 'does not carry with it, into another State, the efficacy of a judgment upon property or persons, to be enforced by execution. *To give it the force of a judgment in another State, it must be made a judgment there; and can only be executed in the latter as its laws may permit.*' "

Baker by Thomas v. General Motors Corp., supra, 118 S.Ct. at 668 (Scalia, J. concurring) (emphasis added), *quoting*, *Lynde v. Lynde*, 181 U.S. 183, 187, 21 S.Ct. 555, 556, 45 L.Ed. 810 (1901), *quoting*, *McElmoyle, supra*, 13 Pet. at 325.[6]

Moreover, the *Baker* opinion is entirely consistent with, if not commanded by, the long-settled law of judgments. *See, e.g.*, Henry Campbell Black, *A Treatise on the Law of Judgments, Including the Doctrine of Res Judicata*, Chap. 1, § 5 at 8-9 (West 1891) ("Enforcement is not an integral part of the judgment. The judgment is merely the affirmation of a liability. The right to use the process of

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[6] Justice Scalia also made it clear that these rules apply *with at least equal force to judgments affecting the ownership of real property. Id., citing, Watts v. Waddle*, 6 Pet. 389, 392, 8 L.Ed. 437 (1832) (a case involving a suit to obtain an equity decree ordering the conveyance of land, duplicating such a decree already issued in another state).

the court for its enforcement is a consequence which the law attaches to it"); I Edward W. Tuttle, *A Treatise on the Law of Judgments*, § 4 at 6-7 (Bancroft-Whitney 5th ed. 1925) ("The law provides the means of enforcing judgments. No court has authority to assume legislative powers by providing other means").

By simply ignoring this Court's command in this regard (*Baker* is neither cited nor discussed by the opinion below), the Court of Appeals simply sweeps aside four Louisiana statutes and one codal provision – which together constitute Louisiana's statutory procedure for the enforcement of judgments and the erasure of a mortgage pursuant to a federal (foreign) judgment. The Court of Appeals thereby does injury to our federalism by creating a new species of federal "super judgment", *i.e.*, one that does not have to be enforced, but which automatically invalidates state laws, and erases state public records, merely by the force of its entry by the federal court.[7] Finally, in this regard, the opinion below also ignores a prior *en banc* decision of the Fifth Circuit, which held that the Bankruptcy Code:

> . . . leaves the parties to their state law collection rights. To execute a judgment against [state] property, *a judgment creditor must rely on the state mechanism for enforcement*. . . . because [a bankruptcy judgment] *is not self-executing*, it provides

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[7] Because it is undisputed that Regions Bank never attempted to domesticate or enforce the Bankruptcy Order in Louisiana, and because the Mortgage was never cancelled, and its inscription never erased, the specific provisions of these Louisiana laws are not material to the instant analysis, except to say that they indisputably provide a specific and orderly procedure through which Regions Bank could have procured the final cancellation of the Mortgage and its removal from the public records.

> no means for enforcing the creditor's right. . . . Pursuant to Rule 69(a), incorporated by Bankr.R. 7069, *[a state's] enforcement mechanisms govern in bankruptcy court* in the absence of a federal execution statute.

Davis v. Davis (In re Davis), 170 F.3d 475, 482, 483 (5th Cir.) (*en banc*) (Jones, J.), *cert. denied*, 120 S.Ct. 67 (1999) (emphasis added).[8]

B. The Opinion Below Conflicts With This Court's Decisions, And Prior Decisions Of The Fifth Circuit, Applying The Doctrine Of Preemption.

Louisiana Revised Statutes 9:5031 and 5251 clearly mandate that no mortgage or other form of security interest in Louisiana real property may be "in any manner affected", as the result of a sale in bankruptcy, except through the domestication and enforcement in Louisiana of the bankruptcy order and judgment. La. R.S. 13:4241 and 13:4242, and La. C.C.P., Art. 2541, provide a clear and orderly procedure for the domestication and enforcement of federal judgments in Louisiana. As the Attorney General of Louisiana maintained in the Fifth Circuit, there are sound policy reasons behind this, as it removes the Recorder of Mortgages from the *quasi* judicial role of evaluating whether service was proper, whether all parties were represented, and so forth. As demonstrated above, however, the opinion below simply sweeps these State laws aside, and mandates that, in effect, they do not

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[8] Like § 522(c) of the Bankruptcy Code, involved in *Davis v. Davis*, the section involved herein, § 363(f), similarly provides no means for enforcing rights granted thereunder. Moreover, there is no federal execution statute that would control enforcement of rights under § 363(f). *See Davis v. Davis*, 170 F.3d at 483. This case will be discussed more fully in the next section.

exist. The decisions of this Court, however, make it clear that, before a state law may be invalidated by a federal law, the federal court must engage in a careful and rigorous analysis under the doctrine of preemption. *See Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Dev. Comm'n*, 461 U.S. 190, 204, 103 S.Ct. 1713, 1722, 75 L.Ed.2d 752 (1983); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed.2d 1447 (1947).

Not only does the opinion below simply ignore this Court's preemption decisions, but, as noted above, it also ignores a prior *en banc* decision of the Fifth Circuit holding that the Bankruptcy Code does *not* preempt state law in the specific context of state enforcement statutes. *Davis v. Davis (In re Davis)*, 170 F.3d 475 (5th Cir.) (*En banc*) (Jones, J.), *cert. denied*, 120 S.Ct. 67 (1999).[9] Petitioners respectfully submit that, under the Appellate Court's analysis, the judicially-created "self executing" judgment implicitly, if indeed not explicitly, preempts the Louisiana statutory scheme in question. For such preemption to

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[9] The opinion below attempts to distinguish *Davis v. Davis*, albeit without analysis, on the basis that Respondents herein "did not need to take further steps to 'execute' the bankruptcy court's orders". App. at 14-15. This bare comment, however, completely begs the question of the nature of the bankruptcy order and judgment and assumes, without analysis, that the judgment is "self executing". This completely ignores this Court's commands in *Baker, supra*. Moreover, this comment forcefully underscores Petitioners' position that the opinion below is entirely dependent on the implicit creation of a federal "super judgment" that does not require enforcement and can simply sweep aside State laws without bothering to acknowledge that the State law is actually being preempted.

exist, it is simply not sufficient, under this Court's decisions, for a federal court to say, as the opinion below does, that:

> If a bankruptcy court's orders authorizing and approving a sale free and clear of liens were not self executing, it would seemingly be impossible to have the liens attach to the sale proceeds.

App. at 15.[10]

In essence, the opinion below holds that the convenience of administration of a bankrupt estate justifies simply ignoring state statutes, without even making a preemption analysis. Yet the opinion below invalidates the Louisiana statutory scheme for the enforcement of judgments as completely as if it had been carefully analyzed and deemed to be preempted. This Court's decisions simply do not allow judicial convenience to substitute for a finding that Congress intended, either expressly or impliedly, to preempt state law. Indeed, the only support the opinion finds for this approach is in a district court opinion which was affirmed by the Tenth Circuit without addressing this specific issue. *In re Whatley*, 155 B.R. 775, 781 (D. Colo. 1993), *aff'd*, 168 B.R. 698 (D. Colo. 1994), *aff'd*, 54 F.3d 788 (10th Cir. 1995). Petitioners are confident, however, that, if an appropriate preemption analysis is employed, it will be held that 11 U.S.C.

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[10] It must be pointed out that *there were no proceeds of the sale in question*, because the bankruptcy court approved, in violation of 11 U.S.C. § 363(f)(3), an auction sale price for the property that was below the total value of the liens and encumbrances against the property. In fact the price set was below the amount of Respondent Regions Bank's first mortgage on the property. Thus, by virtue of Regions' credit bid, some 62 other liens and encumbrances, including a federal tax lien, were simply ignored.

§ 363(f) cannot be said to impliedly preempt the Louisiana statutory scheme in question herein.

First, it is clear that Congress did not expressly preempt state law by enacting the Bankruptcy Code, and that any specific provision of the Bankruptcy Code may be said to "impliedly" preempt any specific provision of state law *only* if that specific "state law thwarts the 'accomplishment and execution' of Congressional intent". *See Davis v. Davis, supra,* 170 F.3d at 483, *quoting, Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Dev. Comm'n,* 461 U.S. 190, 204, 103 S.Ct. 1713, 1722, 75 L.Ed.2d 752 (1983). More specifically, the Fifth Circuit in *Davis v. Davis* held that § 522(c) of the Bankruptcy Code did not impliedly preempt the "homestead exemption" in Texas State law such that a judgment could be enforced through the Bankruptcy Court against a Texas homestead. 170 F.3d at 477, 482-483.

To sustain the "self executing" nature of a bankruptcy judgment, it would have to be the case that the "clear and manifest purpose of Congress" was to preempt Louisiana real property law and the Louisiana statutory enforcement scheme. In addition, there would have to be a finding that these Louisiana laws present a "direct conflict between compliance with [§ 363(f) of] the Bankruptcy Code and the [Louisiana State] law." 170 F.3d at 482. It cannot rationally be said that the Louisiana enforcement scheme, including specifically La. R.S. §§ 9:5031 and 9:5251, is any more in conflict with § 363(f) than the Texas Homestead Act was in conflict with § 522(c).

Put simply, if § 522(c) of the Bankruptcy Code cannot preempt the Texas statutory homestead exemption so as to allow the execution of a bankruptcy judgment against a Texas homestead, then there can be no basis upon

which § 363(f) of the Code can be held to preempt Louisiana's real property law and its statutory scheme for the enforcement of judgments. It would require such preemption to permit a bankruptcy order to be "self executing" as against Louisiana real property rights without the necessity of enforcement under Louisiana law. Just as with the Texas homestead exemption in *Davis v. Davis*, the Louisiana statutory scheme does not thwart the ultimate purpose of § 363(f); it simply requires that the purchaser of the property take the additional step of enforcing the judgment in Louisiana – just as is the case with every other federal judgment.[11]

In the final analysis, the opinion below cannot be allowed to stand, because it invalidates State law, and renders it entirely ineffective, without even undertaking any kind of preemption analysis.

C. The Opinion Below Conflicts With This Court's Decisions Under Both The Tenth And Eleventh Amendments.

To sweep aside these State laws, with no preemption analysis, under the guise of the Bankruptcy Code and the

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[11] Petitioners have argued in State court that the bankruptcy order and judgment may not now be enforced because the right to seek enforcement of a foreign judgment has expired under State law. The merits of this position, however, are not properly before the federal courts for two reasons: (1) In over fourteen years, Respondents have made no attempt to enforce the bankruptcy order and judgment. (2) The expiration of the enforcement period is clearly a matter for the State courts. *See United States v. Fiorella*, 869 F.2d 1425, 1426 (11th Cir. 1989) (The right to enforce a federal judgment may not extend beyond the time provided by the law of the state within which the judgment is to be enforced). In a nutshell: They had a judgment. They didn't enforce it. They waited too long. Now, they can't enforce it.

relitigation exception to the Anti-Injunction Act, has the dual effect of violating state sovereignty under both the Tenth and Eleventh Amendments. In addition, such action creates an intolerable situation for the State of Louisiana, and all other states, by destroying the integrity of the state's public records.

This Court's decisions have long established that "[t]he Tenth Amendment gives to the State the exclusive right to legislate concerning the lands within her borders . . . " *Sunderland v. United States*, 266 U.S. 226, 227 (1924); *United States v. Fox*, 4 U.S. 315, 320 (1876). Moreover, when applying the doctrine of preemption, Courts must apply:

> . . . a presumption that areas of law traditionally reserved to the states, like police powers or *property law, are not to be disturbed absent the "clear and manifest purpose of congress".*

Davis v. Davis, supra, 170 F.3d at 482, *quoting Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed.2d 1447 (1947) (emphasis added).

The Louisiana statutes principally involved herein, La. R.S. 9:5031 and 9:5251, are something of a hybrid. On the one hand, they are part of Louisiana's statutory scheme for the enforcement of judgments. *See also* La. R.S. 13:4241; 13:4242; and La. C.C.P., Art. 2541. They are also undeniably part of the real "property law" of the state of Louisiana, because they regulate the existence and recognition of mortgages on real property interests and serve to maintain the integrity of Louisiana's public records. For example, La. R.S. 9:5251 provides, in pertinent part, that a collateral mortgage encumbering real property rights, such as the Mortgage *may not be "in any manner* affected by any public or private sale of property subject thereto in *any* . . . bankruptcy . . . ", except through the *enforcement* procedure for all judgments, including federal

judgments. La R.S. 9:5251 (emphasis added). Thus, a federal court should exercise extreme caution in impliedly invalidating these real property laws. Moreover, the effect of the "super judgment" created by the opinion below is particularly offensive when one considers its impact on Louisiana's public records.

Louisiana is a record notice jurisdiction. *McDuffie v. Walker*, 51 So. 100 (La. 1909). This means, *inter alia*, that the recordation of a mortgage in Louisiana is an official act of the State, La.Civ.Code Arts. 3342-3348, and that the Parish Recorder of Mortgages is an officer of the State. La.Civ.Code Arts. 3386-3396.[12] In Louisiana, as long as a mortgage is recorded and not erased, that mortgage is conclusively presumed to exist in the eyes of the State. La.Civ.Code Arts. 3345, *et seq.*; *Phillips v. Parker*, 483 So.2d 972, 975 (La. 1986). This, the "public records doctrine", both requires the inspection of the mortgage rolls to ascertain what encumbrances exist against a particular parcel of property, and at the same time, protects all persons in their reliance on the mortgage rolls. *Matter of De La Vergne*, 156 B.R. 773 (Bkrtcy.E.D.La. 1993). All persons are conclusively presumed to have notice of the existence of all mortgages recorded on the mortgage rolls. *Id.*

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[12] The Articles of the Louisiana Civil Code cited in this section were amended, renumbered, and, in some cases, redesignated as sections of Title 9 of the Louisiana Revised Statutes by Act 631 of 1991 and Act 1132 of 1992, both of which became effective on January 1, 1993. These acts provide that mortgages and privileges created prior to January 1, 1993 continue to be regulated by the law in effect prior to that date. Accordingly, where there has been a change, the relevant Louisiana Law will be cited in this section as it was designated prior to January 1, 1993.

The clear effect of the self-executing "super judgment", however, will be to destroy the integrity of Louisiana's public records. The Mortgage has remained recorded in the public records for fourteen years. It was re-inscribed by the Recorder of Mortgages some eight years after the entry of the bankruptcy judgment and order. It was certified by the Recorder of Mortgages to be validly recorded one year after that. In fact, in 1998, the inscription was erroneously cancelled by the Recorder and this erroneous cancellation was reversed, *ab initio*, by the Recorder some five months later in 1999, based upon a legal opinion from her counsel. Despite all this, the opinion below holds that the Mortgage was somehow invalidated, by operation of law, immediately upon entry of the "self-executing" federal judgment. Put simply, no Court has the power to invalidate state public records merely by judicial fiat.

If the opinion below is upheld, no one may ever again peruse Louisiana's mortgage records with any confidence that they are accurate. The ultimate nightmare, under the regime created by the opinion below, would be the situation where a person owning real property in Louisiana declares bankruptcy in, say for example, California. In examining the title to real property in Louisiana, one could not rely upon the accuracy of the Louisiana property records. One could not even simply search the records of the three bankruptcy courts in Louisiana; one would be forced to expand his search to all ninety-five bankruptcy courts.[13] When set against such a

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[13] One is tempted to say that the ultimate effect of the opinion below would be to create a federal property court and a federally supervised mortgage recordation system, but even this extreme formulation would not accurately describe the

potentially chaotic situation, to require that bankruptcy orders affecting real property interests in Louisiana, just like any other federal judgment, be domesticated and enforced pursuant to Louisiana law seems indeed a reasonable palliative. This is precisely what Louisiana did, and the opinion below simply sweeps aside those laws, with no preemption analysis and on the sole articulated basis of the administrative convenience of the bankruptcy court.

This potentially extreme situation is precisely what moved the Attorney General of Louisiana to enter this case in the Fifth Circuit on behalf of the State as *Amicus Curiae*. The Attorney General meticulously laid out the State's rationale for the laws in question, and went so far as to say that the State of Louisiana "could not accept" a situation where its laws were simply invalidated and the integrity of its public records destroyed. App. at 12-14. The Court responded in such a way as to make it clear that it took seriously neither the Attorney General's arguments, nor the State's presence in the case. The opinion below reads:

> The implication of [the Attorney General's] language is clear – if a Louisiana District Court Judge determines that one or more of the listed "legal niceties" have not been observed, then the order is not enforced in Louisiana. But, in relevant part, whether the above-listed "legal

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chaos which would be engendered. Even if every prospective purchaser of property, and every potential real estate lender, could be presumed to have the time and the resources to search the records of every federal bankruptcy court, it could not be done. To the best of Petitioners' knowledge, there is simply no way to request anything resembling or substituting for a "mortgage certificate" from the federal court system.

> niceties" were observed in the sale of the leasehold to the Bank was determined by the bankruptcy court and by the district court.

App. at 13-14.

The "legal niceties" referred to are such defenses to enforcement as "whether the judgment was validly entered, whether [personal] jurisdiction existed in the rendering court, whether the holder of the mortgage had been afforded notice and a fair opportunity to be heard, whether or not the right to enforce the judgment had lapsed under state law, and so on." App. at 13. The Attorney General's point was that the Louisiana statutory scheme ensured that these questions would be addressed at a domestication hearing *by a judge* where appropriate and not by casting a parish Recorder of Mortgages in a *quasi* judicial role. Prior to the opinion below, it was universally understood that such defenses could be addressed by a state court in domesticating a judgment. *See, e.g., Baker, supra,* 118 S.Ct. at 665 ("Orders commanding action or inaction have been denied enforcement in a sister state where they purported to accomplish an official act within the exclusive province of that other state").

In fact, even the opinion below *itself,* in another section, recognizes that a bankruptcy judgment ordering a sale free and clear of liens may be invalid, and thus not subject to domestication and enforcement under state law if the lienholder did not receive adequate notice. App. at 10-11, *citing, Ray v. Norseworthy,* 90 U.S. 128 (1874) (holding that a sale of property purportedly free and clear of liens was ineffective in cancelling the lien held by an individual not given notice of the sale); *Mooney Aircraft v. Foster (In re Mooney Aircraft, Inc.),* 730 F.2d 367, 375 (5th Cir. 1984) ("We recognize that a sale free and clear is ineffective to divest the claim of a creditor who did not receive notice . . . "). Yet, the opinion below fails to

acknowledge that the state domestication hearing might be the only opportunity an aggrieved citizen might have to raise such an objection.

Once again, the opinion below comes down to the creation of a self-executing "super judgment". In this particular instance, the opinion below irrebuttably presumes that each and every order of every bankruptcy court has been made with perfect knowledge of all facts, and must therefore be deemed self executing, even if the bankruptcy judge had been unaware, for example, that proper notice had never been given to a lienholder. This "super judgment" likewise sweeps aside all state laws concerning the domestication and enforcement of judgments and the regulation of real property interests, which procedures have heretofore been regarded as a salutary final opportunity, on the part of the enforcing state, to ensure that all due process has been afforded.

Thus, the analysis of the opinion below comes full circle to the precedents discussed above, with respect to the enforcement of judgments. All judgments must be enforced, and all federal judgments must be enforced pursuant to the laws of the state in which enforcement is sought. *Baker by Thomas v. General Motors*, 522 U.S. 222, 118 S.Ct. 657, 664-665, 139 L.Ed.2d 580 (1998). No court may assume legislative powers and decree the means of enforcement of its own judgments. I Edward W. Tuttle, *A Treatise on the Law of Judgments*, § 4 at 6-7 (Bancroft-Whitney 5th ed. 1925).

The opinion below completely misses the point of the analysis in the Fifth Circuit's own *en banc* decision. In *Davis v. Davis, supra*, the Court dismisses out of hand the argument that the provision of the Bankruptcy Code at issue there was "literally self-executing [because in so

arguing] [appellant] has confused her right with her remedy". 170 F.3d at 481. This is among the most basic principles of American jurisprudence. A judgment enunciates rights. The remedy lies in enforcement of the judgment. By virtue of the bankruptcy judgment, Regions Bank may be said to have had the right to have the Mortgage extinguished in State court under State law. By failing to avail themselves of the remedy of enforcement, they never effectuated that right. Whether or not that right has now lapsed must be decided under State law.

Finally, in this section, Petitioners respectfully submit that the treatment by the opinion below of the State enforcement statutes, the State property law, the State public records, and the State itself in the person of the Attorney General, is sufficiently egregious to call into play the Eleventh Amendment, and this Court's recent jurisprudence thereunder. In a series of landmark decisions over the last several years, this Court has implicitly identified a zone of state sovereignty which federal law may not violate. Put simply, by sweeping aside State laws with respect to the enforcement of judgments and the regulation of real property interests, without even a preemption analysis, the decision below has encroached impermissibly into that zone.

After *Rivet II*, a federal bankruptcy court will have the implicit power to invalidate state public records, and not even inform the state that it has done so. A federal bankruptcy court may not simply "snap its fingers" and cause a validly recorded mortgage simply to disappear. Petitioners respectfully submit that the enforcement of rights granted by a federal bankruptcy court must be done through the enforcement machinery of the state in which enforcement is sought.

D. The Opinion Below Conflicts With This Court's Decisions Under The Anti-Injunction Act And The All Writs Act.

Under the relitigation exception to the Anti-Injunction Act, a federal court "may not grant an injunction to stay proceedings in a state court except . . . to protect or effectuate its judgments". 22 U.S.C. § 2283. This Court's precedents establish that "an essential prerequisite for applying the relitigation exception is that the claims or issues, which the federal injunction insulates from litigation in state proceedings, *actually have been decided by the federal court*". *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 148, 108 S.Ct. 1684, 1690, 100 L.Ed.2d 127 (1988) (emphasis added). This standard is "strict and narrow". *Id.*[14] The opinion below violates this principle in at least two ways:

First, by holding that the bankruptcy order was "self-executing", the opinion ignores the necessity for enforcement, under state law, of all federal judgments. By obvious application of logic, the facts and circumstances surrounding the enforcement, or non-enforcement, of the bankruptcy judgment in question, and the effects thereof, could not have been actually decided in the THILP Bankruptcy. Thus, their determination should not have been enjoined under the relitigation exception. This aspect of

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[14] The opinion below states that an earlier panel of the Fifth Circuit found, in the context of *Rivet I*, that Petitioners claim had been actually litigated and decided. App. at 9-10, *citing*, *Rivet I*, 108 F.3d at 590-591. This is strictly correct, albeit misleading. *Rivet I* was before the earlier panel on the basis of removal jurisdiction, and not under the Anti-Injunction Act. Thus, the earlier panel had only to make a simple application of the doctrine of claim preclusion or *res judicata*, and was not bound to apply the "strict and narrow" standard of "actually decided" that is applicable here under the Anti-Injunction Act.

the opinion below will be discussed more fully in the ensuing section.

Second, the opinion below ignores two other circumstances, clearly occurring after the THILP Bankruptcy, which could have given rise to a State law cause of action independent of anything "actually decided" in federal court: *After* the judgment in question, (1) the bankruptcy debtor reaffirmed the debt underlying the mortgage, and (2) the Recorder of Mortgages re-inscribed the Mortgage on the public records. At a minimum, the federal court should have deferred to the State of Louisiana to determine the effect of its own public act, particularly where the act in question concerned the State's regulation of real property interests within its borders. This real property aspect of this case brings into play this Court's decisions under the Tenth Amendment. (Section II C, *supra*)

In addition to ignoring these peculiar factual circumstances which call into play this Court's "actually decided" doctrine under the Anti-Injunction Act, the opinion below also does violence to the very analytical framework within which this Court has mandated that the Anti-Injunction Act be approached. This Court's decisions make it clear that an Anti-Injunction Act Plaintiff must show a strong equitable entitlement to an injunction. *See, e.g., Mitchum v. Foster*, 407 U.S. 225, 229-237, 92 S.Ct. at 2151, 92 L.Ed.2d 705 (1972); *Amwest Mortgage Corp. v. Grady*, 925 F.2d 1162, 1164 (9th Cir. 1991). This Court has mandated that federal courts are to exercise caution in issuing injunctions, and are to err in favor of permitting state court proceedings. *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 630, 97 S.Ct. 2881, 53 L.Ed.2d 1009 (1971); *J.R. Clearwater, Inc. v. Ashland Chemical Co.*, 93 Fed.3d 176, 179 (5th Cir. 1996); *Bechtel Petroleum, Inc. v. Webster*, 796 F.2d 252, 253 (9th Cir. 1986). As the late Justice Black put it: *"[a]ny doubts . . .* should be resolved

in favor of permitting the state courts to proceed in an orderly fashion to finally decide the controversy". *Atlantic Coast Line R. Co. v Brotherhood of Locomotive Engineers*, 398 U.S. 281, 287, 90 S.Ct. 1738, 1748, 26 L.Ed.2d 234 (1970) (Black, J.) (emphasis added).[15]

Finally, the opinion below also conflicts with this Court's precedents applying the All Writs Act, 28 U.S.C. § 1651.[16] This Court has made it clear that the All Writs Act:

> 'does not authorize [federal courts] to issue *ad hoc* writs whenever compliance with statutory procedure appears inconvenient or less appropriate.' Where, as here, there is a state statutory procedure for the enforcement of judgments which 'specifically addresses the particular issue at hand, *it is that authority, and not the All Writs Act, which is controlling*'.

Pennsylvania Bureau of Correction v. United States Marshals Service, 474 U.S. 34, 43, 106 S.Ct. 355, 361, 88 L.Ed.2d 189 (1985) (emphasis added). *See also Aetna Casualty & Surety Co. v. Markarian*, 114 F.3d 346, 350 (1st Cir. 1997).

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[15] This jurisprudential point is particularly clear where, as here, Respondents made no attempt in the courts below to demonstrate any impediment to the maintenance of their own affirmative defense in state court. *See, e.g., Southern California Petroleum Corp. v. Harper*, 273 F.2d 715, 719 (5th Cir. 1960) (Wisdom, J.).

[16] The All Writs Act embodies the broader and more basic grant of power to the federal courts, and the Anti-Injunction Act places specific limitations on the broad grant of power found in the All Writs Act. 17 *Moore's Federal Practice*, § 121.32 at 121-48 to 121-49 (Matthew Bender 3rd ed. 1999). Because the All Writs Act could not have been used by the district court, then, *a fortiori*, the Anti-Injunction Act, and the relitigation exception, also could not have been used. *See Kline v. Burke Construction Co.*, 260 U.S. 226, 229-230, 43 S.Ct. 79, 67 L.Ed.2d 226 (1922) (the predecessor to the Anti-Injunction Act had to be read in conjunction with the All Writs Act).

It cannot be doubted that Louisiana's statutory scheme for the enforcement of federal Judgments and the cancellation of Mortgages – consisting, *inter alia*, of La. R.S. 9:5031; 9:5251; 13:4241; 13:4242; and La. C.C.P. art. 2541 – is just such a statutory procedure, designed to address the issue that was at Regions' hand following its purchase of the subject property in 1986. This State statutory procedure was available for Regions Bank to use, and the Bank chose not to avail itself thereof. The federal courts below have employed the All Writs Act in an *ad hoc* way, so as to compensate for this failure of the Regions Group to follow this Louisiana statutory procedure, enforce the bankruptcy judgment, and extinguish the Mortgage. This they were forbidden to do by *Pennsylvania Bureau of Correction*, a case which the court below declined even to discuss.

CONCLUSION

For the reasons set forth herein, a Writ of Certiorari should issue to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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APPENDIX A

REVISED, OCTOBER 3, 2000

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 99-30501

REGIONS BANK OF LOUISIANA;
WALTER L BROWN, JR;
PERRY S BROWN; FSA, L.L.C.

Plaintiffs-Appellees

v.

MARY ANNA RIVET; MINNA REE WINER;
EDMOND G MIRANNE; EDMOND G MIRANNE, JR

Defendants-Appellants

Appeal from the United States District Court
for the Eastern District of Louisiana

August 22, 2000

Before KING, Chief Judge, and GARWOOD and DeMOSS, Circuit Judges.

KING, Chief Judge:

Defendants-Appellants Mary Anna Rivet, Minna Ree Winer, Edmond G. Miranne, and Edmond G. Miranne, Jr. appeal from the district court's judgment permanently enjoining them from relitigating in state court issues and claims regarding a collateral mortgage that had previously been decided by order of a federal bankruptcy court and from enforcing two default judgments. Defendants-Appellants argue that the Anti-Injunction Act, 28

U.S.C. § 2283, bars the district court's actions. Although we find that the lower court properly enjoined relitigation of issues and claims regarding the collateral mortgage, we determine that its enjoining enforcement of the default judgments was in error. As a result, we affirm in part and reverse in part.

I. FACTUAL AND PROCEDURAL BACKGROUND

At the heart of this case is a collateral mortgage on a leasehold estate granted by Tulane Hotel Investors Limited Partnership ("THILP") to members of the Miranne family (Defendants-Appellants Edmond G. Miranne, Edmond G. Miranne, Jr., Mary Anna Rivet, and Minna Ree Winer, hereinafter "the Mirannes") to secure a $5,000,000 collateral mortgage note.[1] The leasehold estate was created in 1957, when Lois Stern Brown executed a lease in favor of Pelican State Hotel Corporation. After a number of subsequent transfers, the leasehold estate was acquired by THILP in September 15, 1983. On that same date, THILP granted to First Financial Bank[2] a first mortgage on the leasehold to secure a $15,000,000 collateral mortgage note pledged to the Bank. On May 2, 1984,

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[1] THILP was described by a district court as the Mirannes' investment vehicle. *See United States ex rel. Minna Ree Winer Children's Class Trust v. Regions Bank*, Civ.A.No. 94-4085, 1996 WL 264981, at *1 (E.D.La. May 17, 1996). Minna Ree Winer is the wife of Edmond Miranne Jr.; Mary Ann Rivet is the wife of Edmond Miranne.

[2] This Bank apparently was formerly controlled by the Miranne family. *See Minna Ree Winer Children's Class Trust*, 1996 WL 264981, at *1.

THILP granted the Mirannes the second mortgage on the leasehold that forms the basis of the parties' instant dispute. That mortgage was recorded in the public records on August 17, 1984.

THILP apparently defaulted on its loan to First Financial Bank, causing the Bank to act to enforce its mortgage on the partnership's primary asset, the leasehold estate. On October 5, 1984, THILP sought protection under Chapter 11 of the Bankruptcy Code. The bankruptcy court subsequently granted First Financial Bank's motion to convert the proceeding to a Chapter 7 liquidation proceeding and appointed an interim trustee. In April, 1986, the appointed trustee applied for court approval to sell the leasehold estate at public auction free and clear of all liens, including, specifically, the second mortgage. The bankruptcy court issued an order advising all creditors and parties in interest of the sale pursuant to 11 U.S.C. § 363(f), and setting a hearing on any objections for June 16, 1986. THILP objected to the sale. Edmond Miranne Jr. appeared at the hearing on behalf of himself and Edmond Miranne Sr., as holders of the second mortgage. On June 17, 1986, the bankruptcy court denied the objection, granted the sale application, authorized the trustee to sell the property, and ordered that the sale would be free and clear of all interests, claims, liens, mortgages and encumbrances, including the Mirannes' second mortgage. The court also included in his order the terms of the sale (e.g., there would be a minimum opening bid of $5,250,000), with the listed terms reflecting the provisions of a letter agreement between First Financial Bank and the trustee. THILP appealed from this order and moved for a stay. A hearing was held on the matter,

and THILP's motion for a stay was denied by the bankruptcy court and by the district court.

The leasehold was sold at public auction to First Financial Bank for the minimum bid of $5,250,000.[3] On August 14, 1986, the bankruptcy court approved the sale to First Financial free and clear of all encumbrances other than four chattel mortgages. First Financial was ordered to pay $150,000 to the trustee, an amount previously agreed upon, and to pay the auctioneer's fees and costs.[4] The Orleans Parish Recorder of Mortgages was directed by the bankruptcy court to cancel and erase all liens, mortgages, and encumbrances bearing against the property. Nonetheless, the Mirannes contend that the second mortgage remains on the public records.[5]

On December 29, 1993, Secor Bank, First Financial Bank's successor, purchased from Walter S. Brown, Jr. and Perry L. Brown (members of Lois Stern Brown's family) the fee interest in the property, making Secor the owner of both the property and the leasehold. This caused the

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[3] This amount represented 75% of the $7,000,000 appraised value of the property as found by the court in a judgment signed June 9, 1986.

[4] THILP appealed to our court from the bankruptcy court's orders approving the sale of the leasehold. This appeal was dismissed on the basis of 11 U.S.C. § 363(m). *See In re: Tulane Investors Ltd. Partnership*, No. 86-3836 (5th Cir. June 1, 1987) (unpublished).

[5] Because the first mortgage was not reinscribed after ten years, it was cancelled. *See* La.Rev.Stat. Ann. 9:5161 (West 1991) (allowing for cancellation of inscriptions of mortgages that have not been reinscribed within applicable periods).

lease to cease to exist.[6] Secor immediately conveyed its interest to FSA, the current owner of the property.

On December 29, 1994, the Mirannes filed a "Suit to Enforce Mortgage Via Ordinaria or Alternatively for Damages" in state court against Regions Bank (Secor's successor), Perry Brown, Walter Brown, and FSA, alleging that the Mirannes' superior rights under the second mortgage had been violated by the 1993 transactions. The Mirannes sought payment of their secured debt and to have their mortgage recognized and maintained against the property, and alternatively, sought damages.[7]

On February 3, 1995, defendants in the state action (Plaintiffs-Appellees here) removed the case to federal court on grounds of federal question jurisdiction. FSA filed an answer in federal court on February 7, 1995, and the Browns filed answers in federal court on February 14, 1995. The district court denied the Mirannes' motion to remand and granted Regions Bank's motion for summary judgment.

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[6] As this court noted in *Rivet v. Regions Bank*, 108 F.3d 576, 581 n.7 (1997) ("*Rivet I*"), *rev'd*, 522 U.S. 470 (1998), under Louisiana law, "when a lessor's interest and a lessee's interest in the same immovable property are consolidated in the same person, the lease ceases to exist and the person vested with both interests will hold perfect or full ownership – essentially the equivalent of 'fee simple' title in the common law."

[7] Judge Wiener, writing for the panel in *Rivet I*, noted that "[i]n their complaint, the Mirannes assiduously avoided any hint of the previous bankruptcy proceedings and orders affecting the leased premises, the leasehold estate, and their second mortgage against it." *Rivet I*, 108 F.3d at 582.

This judgment was appealed to this court, which affirmed the district court's denial of the motion to remand. *See Rivet v. Regions Bank of La., F.S.B.*, 108 F.3d 576 (5th Cir.1997) ("*Rivet I*"). The Supreme Court reversed, *see Rivet v. Regions Bank of La.*, 118 S. Ct. 921 (1998), and the case was remanded to state court. The clerk of the district court apparently forwarded only the order of remand to the state court. The answers of the Browns and of FSA were not also forwarded. On August 7, 1998, Regions Bank, FSA, and the Browns filed this action in federal court under the All Writs Act, 28 U.S.C. § 1651, and the relitigation exception to the Anti-Injunction Act, 28 U.S.C. § 2283, seeking preliminary and permanent injunctions against further proceedings in state court.

After this action was filed by Plaintiffs-Appellees, the Mirannes filed in state court a motion for summary judgment against Regions Bank. Three days later, on October 30, 1998, the Mirannes sought preliminary defaults against the Browns and FSA, based on their not having filed answers in state court. On November 4, 1998, a judge, who was not the judge to whom the Mirannes' state-court action had been assigned, confirmed default judgments against the Browns and FSA for $4,688,919.10, and explicitly recognized the second mortgage on the leasehold estate.[8] Documents filed in support of the default judgments did not mention that FSA and the Browns had filed answers in federal court (stating only that no answers had been filed in state court). At the ex parte hearing held with regard to the confirmation of

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[8] The judgment against FSA indicates it is in rem.

default judgments, no mention was made of the answers filed in federal court, or of the leasehold's sale free and clear of all liens.

On January 26, 1999, the district court entered a preliminary injunction, staying further proceedings in state court. Regions Bank filed a motion for summary judgment to enjoin permanently the Mirannes from relitigating the issues regarding the Mirannes' second mortgage that were resolved by the bankruptcy court. The Browns and FSA filed a motion for summary judgment to enjoin permanently the Mirannes from prosecuting the state lawsuit, from executing or enforcing the default judgments, and from initiating any other action to recover against them based on the second mortgage. They also requested that the district court require the Recorder of Mortgages to remove the default judgments from the public records. The Mirannes also filed a motion for summary judgment.

The district court determined that the state-court claim involved the same subject matter as the bankruptcy court's orders and thus that the relitigation exception to the Anti-Injunction Act applied. It also determined that Plaintiffs-Appellees would suffer irreparable injury if the state-action was allowed to proceed, and that conversely, the Mirannes would suffer no injury. Thus, on April 13, 1999, the court entered judgment in favor of Regions Bank, FSA, and the Browns permanently enjoining the Mirannes from relitigating in state court issues and claims regarding the second mortgage that had been decided by order of the bankruptcy court ("Injunction I"), and further permanently enjoining the Mirannes from enforcing the default judgments entered in state court

against the Browns and FSA ("Injunction II"). It denied the Mirannes' motion. The Mirannes timely appeal.

II. THE RELITIGATION EXCEPTION

The Mirannes challenge the district court's determination that the relitigation exception to the Anti-Injunction Act applies to this case. The application of the relitigation exception is an issue of law, and therefore this court reviews de novo the lower court's determination that an injunction may be issued under that exception. *See Next Level Communications LP, v. DSC Communications Corp.*, 179 F.3d 244, 249 (5th Cir. 1999). We review a lower court's decision to issue a permanent injunction for abuse of discretion. *See Peaches Entertainment Corp. v. Entertainment Repertoire Assocs., Inc.*, 62 F.3d 690, 693 (5th Cir. 1995).

We use a four-part test to determine whether the relitigation exception to the Anti-Injunction Act applies to preclude litigation of a claim in state court: (1) "the parties in a later action must be identical to (or at least in privity with) the parties in a prior action"; (2) "the judgment in the prior action must have been rendered by a court of competent jurisdiction"; (3) "the prior action must have concluded with a final judgment on the merits"; and (4) "the same claim or cause of action must be involved in both suits." *New York Life Ins. Co. v. Gillispie*, 203 F.3d 384, 387 (5th Cir.2000) (quoting *United States v. Shanbaum*, 10 F.3d 305, 310 (5th Cir. 1994)). It is insufficient that a claim or issue could have been raised in the prior action: The relitigation exception requires that the claims or issues that the federal injunction is to

insulate from litigation in state proceedings "actually have been decided by the federal court." *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 148 (1988); *Texas Commerce Bank Nat'l Ass'n v. State of Florida*, 138 F.3d 179, 182 (5th Cir. 1998). We must review both the district court's determination that each of these requirements has been met in the instant case and its conclusion that the principles of equity, comity, and federalism supported its issuance of an injunction. *See Regional Properties, Inc. v. Financial & Real Estate Consulting Co.*, 678 F.2d 552, 566 (5th Cir. 1982) (noting that the Anti-Injunction Act does not " 'qualify in any way the principles of equity, comity, and federalism that must [in its absence] restrain a federal court when asked to enjoin a state court proceeding.' " (quoting *Mitchum v. Foster*, 407 U.S. 225, 243 (1972))).

A. *Injunction I*

Injunction I bars the relitigation in state court of issues and claims regarding the Mirannes' second mortgage that were decided by the bankruptcy court. The Mirannes dispute that their state-court action involves claims or issues that have been "actually litigated." They present no arguments regarding the other requirements for application of the relitigation exception.

We note that a prior panel of this court examined, *inter alia*, whether the Mirannes' state-court action involved questions that were "actually litigated" in THILP's bankruptcy proceedings. *See Rivet I*, 108 F.3d at 590-91. It found it "indisputable that in the 1986 bankruptcy court proceedings the continuing validity of the Mirannes' inferior mortgage was 'actually litigated and

decided.' " *Id.* It was subsequently decided that that panel was without jurisdiction to decide the issues before it, *see Rivet v. Regions Bank of La.*, 118 S.Ct. 921 (1998), and we therefore cannot regard its determinations as binding. Our own examination of the Mirannes' argument, however, leads to the same conclusion.

The Mirannes' state-court action is "in part an *in rem* action to enforce a mortgage against immovable property situated in the Parish of Orleans." A key issue decided by the bankruptcy court was whether that same property – the leasehold estate – should continue to be encumbered by the very lien the Mirannes seek to enforce in state court. Under 28 U.S.C. § 1334(e), the bankruptcy court had exclusive jurisdiction over the leasehold estate. In THILP's bankruptcy proceedings, the trustee determined that the bankruptcy estate would benefit by the sale of the leasehold free and clear of essentially all liens, in part because it was only on these terms that First Financial Bank/Secor Bank/Regions Bank (hereinafter "the Bank") would agree to release its claims and pay the trustee $150,000, which could be distributed to the remaining creditors. The bankruptcy court agreed with the trustee's determination, and authorized a sale pursuant to 11 U.S.C. § 363(f). Creditors were given notice of the sale and the opportunity to be heard. *Compare Ray v. Norseworthy*, 90 U.S. 128 (1874) (holding that a sale of property purportedly free and clear of liens was ineffective in cancelling the lien held by an individual not given notice of that sale), *and Mooney Aircraft Corp. v. Foster (In re Mooney Aircraft, Inc.)*, 730 F.2d 367, 375 (5th Cir. 1984) ("We recognize that a sale free and clear is ineffective to divest the claim of a creditor who did not receive

notice. . . . "), *with In re Edwards*, 962 F.2d 641 (7th Cir. 1992) (holding that a bona fide purchaser at a bankruptcy sale acquired good title to the debtor's property, despite the mortgagee not having received prior notice of the sale). There is no question that the bankruptcy court had the power to issue orders that stripped liens from the leasehold estate and that extinguished the Mirannes' rights in that property. See *Norseworthy*, 90 U.S. at 135 ("Beyond all doubt the property of a bankrupt may, in a proper case, be sold by order of the bankrupt court free of incumbrance. . . . ").

The Mirannes state that they do not contest the validity of the bankruptcy court's orders when those orders were entered in 1986. Instead, they contend that because those orders were never domesticated and enforced in accordance with Louisiana law, the orders never had force or effect to extinguish the Mirannes' mortgage rights. The Mirannes point to events occurring after entry of the orders and argue that those events enabled them to "revive" their mortgage and to assert their rights under it in the state-court action.[9] In short, the Mirannes assert

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[9] In addition to the failure of the Bank to domesticate and enforce the bankruptcy court's orders in accordance with Louisiana law, the Mirannes assert that two events are particularly important to their ability to enforce their mortgage. The first of these events is the reaffirmance of the debt between THILP and the Mirannes. This was accomplished in April, 1989, when Minna Ree Winer, President, and THILP's general partner, the Tulane Hotel Investors Corporation, signed a document reaffirming the original debt. The second of the events is the reinscription of the mortgage on the public records in April, 1994.

that whether they are able to enforce their second mortgage today is a question different from that addressed by the bankruptcy court in 1986. At the heart of their argument is the assumption that the bankruptcy court's orders were not self-executing. The orders, rather than effectuating a sale free and clear of all liens, merely gave the Bank a right that required use of state procedures to perfect and enforce.

The Mirannes and the State of Louisiana, as amicus curiae, point to Louisiana Revised Statutes 9:5251[10] and 9:5031,[11] which purportedly prevent any public sale of

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[10] Louisiana Revised Statute 9:5251 seeks to preserve rights of mortgage holders by providing that:

> Except as otherwise provided in Civil Code Articles 813 and 815, no conventional or judicial mortgage . . . shall be cancelled, removed from the public records, or in any manner affected by any public or private sale of property subject thereto in . . . bankruptcy . . . proceeding.
>
> The provisions of this Section shall not apply to the execution of judgments governed by Book IV of the Louisiana Code of Civil Procedure, Article 2251 et seq., or to judicial sales in executory proceedings under the Louisiana Code of Civil Procedure, Article 2631 et seq.

La.Rev.Stat. Ann. § 9:5251 (West Supp. 2000).

[11] Louisiana Revised Statute 9:5031 seeks to protect rights of lien holders by providing that:

> No lien . . . shall be cancelled, removed from the public records, or in any manner affected by any public or private sale of property subject thereto in any . . . bankruptcy . . . proceeding. However, the provisions of this Section shall not apply to the execution of judgments governed by Book IV of the

property in bankruptcy from affecting "in any manner" *any conventional mortgage or lien on that property, and* argue that under these statutes, the Bank was required to use state domestication and enforcement procedures to remove the Mirannes' mortgage and to truly hold the leasehold free and clear of that mortgage. The State of Louisiana states that the purpose of the statutes is

> to avoid putting the Recorder in a *quasi* judicial role by calling on him to determine, inter alia, whether the judgment was validly entered, whether jurisdiction existed in the rendering court, whether the holder of the mortgage had been afforded notice and a fair opportunity to be heard, whether or not the right to enforce the judgment had lapsed under Louisiana law, and so on. Th[e] tried and true Louisiana procedure [listed in the statutes] provides for a Louisiana District Court Judge, and not a Parish Recorder, to decide whether these various legal niceties have been observed, and, therefore, whether a foreign judgment is entitled to enforcement in Louisiana.

Amicus Brief, at 12. The implication of this language is clear – if a Louisiana District Court Judge determines that one or more of the listed "legal niceties" have not been observed, then the order is not enforced in Louisiana. But, in relevant part, whether the above-listed "legal niceties" were observed in the sale of the leasehold estate

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> Louisiana Code of Civil Procedure, Article 2251 et seq., or to judicial sales in executory proceedings under the Louisiana Code of Civil Procedure, Articles 2631 et seq.

La.Rev.Stat. Ann. § 9:5031 (West 1991).

to the Bank was determined by the bankruptcy court and by the district court.[12]

The Mirannes contend that our recent decision in *Davis v. Davis (In re Davis)*, 170 F.3d 475 (5th Cir.) (en banc), *cert. denied*, 120 S. Ct. 67 (1999), supports their position that despite the provisions of the Bankruptcy Code and the language of the bankruptcy court's orders, the Bank was obligated to use state procedures to enforce its right to hold the leasehold estate free and clear of the Mirannes' lien. They rely on portions of *Davis'* language to argue that § 363(f) does not pre-empt Louisiana property law and enforcement provisions. Although we are inclined to disagree with this,[13] we need not decide the question here. We find little in *Davis* that applies directly to the instant case. Unlike the plaintiff in *Davis*, the Bank is not a judgment creditor. The bankruptcy court's orders in this case involved a sale of property determined to be within the court's jurisdiction. Unlike the plaintiff in Davis, who sought to use § 522(c) of the Bankruptcy Code

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[12] The trustee supplied the bankruptcy court with evidence that creditors had been notified of the proposed sale. At several points during the proceedings related to the sale, THILP challenged that sale, arguing, inter alia, that the bankruptcy court did not have jurisdiction over the property, that the requirements of § 363(f) had not been met, and that the sale was enjoined by state law.

[13] We note, for example, that the language of § 363(f), by allowing a trustee to sell a debtor's property free and clear of all liens, would seem to be in direct conflict with the language of the Louisiana statutes, which state that mortgages will not "in any manner" be affected by a public sale in bankruptcy. *See Davis*, 170 F.3d at 482 ("[P]reemption may be implied if state and federal laws conflict. . . . ").

to collect a non-discharged debt, the Bank did not need to take further steps to "execute" the bankruptcy court's orders.

The Mirannes' argument that the questions they raise in their state-court action are different from those resolved by the bankruptcy court must be rejected. Once the sale of the leasehold occurred and was approved, title was transferred, as ordered (free and clear of all liens). *See In re Whatley*, 155 B.R. 775, 781 (D.Colo.1993) (holding that orders authorizing a sale free and clear of liens and confirming that sale were self-executing and did not require "any enforcement proceedings in order to bring them to fruition"), *aff'd*, 169 B.R. 698 (D. Colo. 1994), *aff'd*, 54 F.3d 788 (10th Cir. 1995). If a bankruptcy court's orders authorizing and approving a sale free and clear of liens were not self-executing, it would seemingly be impossible to have the liens attach to the sale proceeds. *See, e.g.*, 11 U.S.C. § 1129(b)(2)(A)(ii) (providing that a "fair and equitable plan" includes those that sell property free and clear of liens, have those liens attach to the proceeds of such sale, and meet other requirements regarding the treatment of those liens on the proceeds); S. REP. No. 95-989, at 56 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5842 ("Most often, adequate protection in connection with a sale free and clear of other interests will be to have those interests attach to the proceeds of the sale."). Orders that were not self-executing would also be inconsistent with the Code's emphasis on the finality of sales. *See, e.g.*, 11 U.S.C. § 363(m); *Edwards*, 962 F.2d at 643 (noting that "[i]f purchasers at judicially approved sales of property of a bankrupt estate, and their lenders, cannot rely on the deed that they receive at the sale, it will be difficult to

liquidate bankrupt estates at positive prices"); *Bleaufontaine, Inc. v. Roland Int'l (In re Bleaufontaine, Inc.)*, 634 F.2d 1383, 1389 n.10 (5th Cir. Unit B 1981) ("If deference were not paid to the policy of speedy and final bankruptcy sales, potential buyers would not even consider purchasing any bankrupt's property. As a result, the bankrupt's creditors would be the ones most injured thereby.").

As was noted in *Rivet I*, "[f]or the bankruptcy court in the instant case to authorize and approve the sale of the leasehold estate free and clear of essentially all liens and encumbrances, that court necessarily had to decide whether the Mirannes' inferior second mortgage could survive as an encumbrance against the leasehold estate after that estate was sold at public auction by the THILP trustee's foreclosure on the superior first mortgage." 108 F.3d at 590. The Mirannes' state-court action represents an attempt to use subsequent events to "revive" and enforce a mortgage on property that had been conclusively stripped of the Mirannes' lien in 1986. Because the Mirannes' state-court action necessarily requires relitigation of the precise question resolved by the bankruptcy action, i.e., the survival of the Mirannes' mortgage as an encumbrance on the leasehold estate, we agree with the district court that the relitigation exception applies in this case.

We also find that the district court did not abuse its discretion in issuing Injunction I. It specifically determined that the Plaintiffs-Appellees would suffer irreparable injury if the Mirannes were allowed to proceed, and that the Mirannes, "who have always been aware of the bankruptcy court's orders to discharge the underlying

debt and to sell the property free and clear of the mortgage," and who have "nevertheless attempted to obtain a judgment from a state court in flagrant disregard of the bankruptcy court's orders," would not be injured by an injunction. With respect to Injunction I, we have no cause to disagree with this conclusion.[14]

B. *Injunction II*

We find we must reach a different conclusion with respect to Injunction II. That injunction bars the Mirannes' enforcement of default judgments, entered by the Civil District Court for the Parish of Orleans, against FSA and the Browns. The Mirannes' challenge to the issuance

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[14] The Mirannes also argue that the district court's actions impermissibly encroach on state sovereignty, citing, among other cases, the Supreme Court's recent Eleventh Amendment decisions in support of their contentions. The crux of the Mirannes' argument appears to be that the district court's actions infringe on the state's "absolute Constitutional authority to judge the existence of real property interests within their borders." Although states have the power to define property interests, it is clear that the Constitution also provides Congress with the authority to establish procedures for the transfer of those interests within the context of bankruptcies. *See* U.S. Const. art. I, § 8, cl. 4 (giving Congress the authority to establish uniform laws on the subject of bankruptcies in the United States); *International Shoe Co. v. Pinkus*, 278 U.S. 261, 264 (1929) ("The power of Congress to establish uniform laws on the subject of bankruptcies throughout the United States is unrestricted and paramount. . . . The national purpose to establish uniformity necessarily excludes state regulation. . . . States may not pass or enforce laws to interfere with or complement the Bankruptcy Act or to provide additional or auxiliary regulations.").

of Injunction II has two main prongs: They assert that the district court had no subject-matter jurisdiction over FSA's and the Browns' claims and that the court's action is inconsistent with the commands of *Parsons Steel, Inc. v. First Alabama Bank*, 474 U.S. 518 (1986). We address first the question of subject-matter jurisdiction.

The Mirannes assert the district court did not have subject-matter jurisdiction over the action brought by FSA and the Browns because "as to them there was no federal element in the State Action." The Mirannes contend that the only way a state court defendant becomes entitled to the protection of that Anti-Injunction Act is to have raised the affirmative defense of res judicata in the state-court proceedings. Because there is no affirmative defense of res judicata on file in the state action,[15] FSA and the Browns are not entitled to the protections of the Act.

We emphatically reject this argument. Neither the All Writs Act nor the Anti-Injunction Act is jurisdictional. *See Southwest Airlines Co. v. Texas Int'l Airlines, Inc.*, 546 F.2d 84, 89 (5th Cir. 1977) (Anti-Injunction Act); *Brittingham v. Commissioner*, 451 F.2d 315, 317 (5th Cir. 1971) (All Writs Act). Instead, jurisdiction is based on the original case (here the bankruptcy proceeding). It is not necessary for the district court to have jurisdiction over the second suit as an original action. *See Royal Ins. Co. v. Quinn-L Capital Corp.*, 960 F.2d 1286, 1292 (5th Cir. 1992) ("[A] federal district court can exercise ancillary jurisdiction over a

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[15] This is due to FSA's and the Browns' answers filed in federal court not being transferred to the state court upon remand.

second action in order to secure or preserve the fruits and advantages of a judgment or decree rendered by that court in a prior action." (internal quotation marks omitted)); *id.* (noting that jurisdiction exists "even where the federal district court would not have jurisdiction over the second action if it had been brought as an original suit"); *see also Local Loan Co. v. Hunt*, 292 U.S. 234, 239 (1934); *In re Mooney*, 730 F.2d at 374. Because the court below was the court in which the bankruptcy proceedings were conducted, it had subject-matter jurisdiction over the claims of FSA and the Browns.

We turn now to the Mirannes' *Parsons Steel* argument. They contend that because the district court did not consider the preclusive effect of the default judgments, and certainly did not give the judgments the preclusive effect they deserved, it erred in issuing Injunction II. *See Parsons Steel*, 474 U.S. at 525. The Supreme Court held in *Parsons Steel* that "the Full Faith and Credit Act requires that federal courts give the state-court judgment, and particularly the state court's resolution of the res judicata issue, the same preclusive effect it would have had in another court of the same State." 474 U.S. at 525. We read the Court's language to require that we assess whether a state court has issued a final decision that operates to bar re-assessment of the preclusive effect of a prior federal action. We therefore confront two questions in the context of this case: whether the default judgments in this case are final judgments, and if final judgments, whether they bar our re-assessment of the res judicata issue. As the *Parsons Steel* Court noted, we must look to state law for the answers to both of these questions. *Id.*

Our analysis of the question whether the default judgments are final judgments under Louisiana law provides us with no definitive answer. On one hand, the language of article 1915(B) of the Louisiana Code of Civil Procedure suggests that the default judgments, because they were issued against fewer than all the parties in the original action, are not final judgments.[16] On the other hand, FSA and the Browns, in filing actions in state court challenging the validity of the default judgments, have acted as though the judgments are final. Our research uncovered no case that has applied the language of article 1915 to hold that default judgments issued against fewer than all the parties are not final judgments. The Mirannes

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[16] At the time the Mirannes filed their state-court action, article 1915(B) of the Louisiana Code of Civil Procedure provided:

> (1) When a court renders a partial judgment . . . as to one or more but less than all of the . . . parties, . . . the judgment shall not constitute a final judgment unless specifically agreed to by the parties or unless designated as a final judgment by the court after an express determination that there is no just reason for delay.
>
> (2) In the absence of such a determination and designation, any order or decision which adjudicates fewer than all claims or the rights and liabilities of fewer than all the parties, shall not terminate the action as to any of the claims or parties and shall not constitute a final judgment for the purpose of an immediate appeal. Any such order or decision issued may be revised at any time prior to rendition of the judgment adjudicating all the claims and the rights and liabilities of all the parties.

La.Code Civ. Proc. Ann. art. 1915 (West 1998).

contend that that article is not applicable to the instant case, but also acknowledge, as they must, a degree of confusion in the extant cases.[17]

If we were to conclude that the default judgments were final judgments, we would still face the preclusion question. Under Louisiana law, judgments that suffer from "vices of form" do not preclude relitigation of the claims or issues because such judgments are null and void.[18] *See Kelty v. Brumfield*, 633 So.2d 1210, 1215 (La. 1994); *Murdock v. Brittco, Inc.*, 517 So.2d 898, 902 (La. Ct.

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[17] The Louisiana Legislature amended Article 1915(B) in 1999 to "eliminate confusion with Article 1915(A)." The amendment, which eliminated the term "parties," was made applicable to cases filed on or after January 1, 2000. *See* 1999 La. Acts 1263 § 3.

[18] Default judgments will be declared null and void if they suffer from any of the defects listed in Louisiana Code of Civil Procedure art. 2002:

> A. A final judgment shall be annulled if it is rendered:
>
> (1) Against an incompetent person not represented as required by law.
>
> (2) Against a defendant who has not been served with process as required by law and who has not waived objection to jurisdiction, or against whom a valid judgment by default has not been taken.
>
> (3) By a court which does not have jurisdiction over the subject matter of the suit.
>
> B. Except as otherwise provided in Article 2003, an action to annul a judgment on the grounds listed in this Article may be brought at any time.

La. Code Civ. Proc. Ann. art. 2002 (West 1990).

App. 1987) ("Since service . . . was not made in accordance with law, it follows that the proceedings which resulted in the default judgment . . . were null, void and of no effect"). Judgments that suffer from "vices of substance" may be annulled as well. *See* La. Code Civ. Proc. art. 2004 (West 1990) (providing that "[a] final judgment obtained by fraud or ill practices may be annulled").

FSA and the Browns have filed petitions in state court seeking to have their default judgments declared null and void, arguing that those judgments suffer from vices of form and of substance. *See* La.Code Civ. Proc. art. 2002; 2004. In addition, Perry Brown has filed a motion for a new trial. FSA and the Browns point to a number of facts that they argue render the default judgments invalid, including (1) the failure to serve Walter Brown while the state court had jurisdiction over the Mirannes' case; (2) the failure of Mirannes' counsel to inform FSA or the Browns of the intent to seek default judgments; (3) the failure of Mirannes' counsel to inform the judge issuing the default judgments that FSA and the Browns had in fact filed answers after the case was removed to federal court;[19] (4) the failure of the Mirannes' counsel to inform the judge of the lengthy history of this case and of the efforts made by FSA and the Browns to defend themselves against the demands made by the Mirannes; (5) the failure of the Mirannes' counsel and of Edmond Miranne Jr.[20] to inform the judge of the bankruptcy court's orders

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[19] The Mirannes' counsel has admitted to not informing the judge of the answers FSA and the Brown filed in federal court.

[20] Edmond G. Miranne, Jr. testified at the ex parte hearing conducted regarding confirmation of the default judgments.

or the leasehold's sale free and clear of the Mirannes' lien; (6) the failure of the Mirannes' counsel to inform the judge of the ongoing proceedings for injunctive relief in federal court; and (7) the falsity of Edmond Miranne Jr.'s testimony at the default judgment hearing as the mortgage he testified was recorded at the time had in fact been cancelled.

FSA argues that we may look to these facts as a basis for a conclusion that the default judgments, if final judgments, do not have preclusive effect. But this means we would be deciding the same questions that the state court has been asked to decide. Thus, under the circumstances, our task under *Parsons Steel* requires that we predict whether that state court would declare the judgments nullities under Louisiana Code of Civil Procedure article 2002, would exercise its discretion and set the judgments aside under article 2004, or rule that the judgments are valid.

We find that the principles of comity and federalism counsel against making such predictions, given the existence of FSA's and the Browns' state-court actions. The Louisiana state court is in the best position to determine whether the default judgments should be declared nullities under state law. Thus, although we view the facts

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The only mention of the transfer of the property from THILP to the Bank occurs on page 12 of the hearings transcript. Mr. Miranne described the sale as follows:

> There was a sale by Tulane Hotel Investors Limited Partnership to what was then First Financial Bank, FSB, which through a couple of mergers and name changes, is now Regions Bank.

that FSA and the Browns present as compelling, we nonetheless determine it best to refrain from drawing any conclusion regarding the judgments' preclusive effect under the circumstances present here. As the Supreme Court advised long ago, federal courts should decline to issue an injunction against state-court proceedings if there are any doubts as to its propriety. *See Atlantic Coast Line R.R. Co. v. Brotherhood of Locomotive Eng'rs*, 398 U.S. 281, 297 (1970) ("Any doubts as to the propriety of a federal injunction against state court proceedings should be resolved in favor of permitting the state courts to proceed in an orderly fashion to finally determine the controversy."). Given the circumstances of this case, we conclude that we must reverse the district court's judgment with respect to Injunction II.

This is not a felicitous result. The default judgments' recognition of the Mirannes' mortgage is in direct conflict with the bankruptcy court's orders, and we certainly would not advocate that others use the means apparently employed here to obtain such judgments. But our displeasure with the outcome with respect to Injunction II cannot be used to uphold its issuance. *Cf. id.* at 294 (noting that a federal court cannot issue an injunction "merely because [state court proceedings] interfere with a federal protected right or invade an area preempted by federal law, even when the interference is unmistakably clear"). Federal courts assessing whether to enjoin state-court proceedings must also assess whether principles of comity and federalism counsel restraint. *See Parsons Steel*, 474 U.S at 526; *Mitchum*, 407 U.S. at 243. Our respect for the state court moves us to leave to it questions related to the

validity and enforceability of the default judgments under Louisiana law.

III. CONCLUSION

For the foregoing reasons, we affirm the district court's judgment as it relates to the injunction barring the Mirannes' relitigating in state court issues and claims covered by the bankruptcy court's orders, and reverse the court's judgment as it relates to the injunction barring the enforcement of the default judgments issued against FSA and the Browns.

AFFIRMED in part; REVERSED in part. The Defendants-Appellants shall bear the costs of this appeal.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

REGIONS BANK OF LOUISIANA ET AL.

VERSUS

MARY ANNA RIVET ET AL.

CIVIL ACTION

NO. 98-2344

SECTION: "S" (4)

JUDGMENT

(Filed Apr. 13, 1999)

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of Regions Bank of Louisiana; FSA, L.L.C.; Walter L. Brown, Jr.; and Perry S. Brown and against Mary Anna Rivet, Minna Ree Winer, Edmond G. Miranne and Edmond G. Miranne, Jr., as follows:

IT IS ORDERED, ADJUDGED, AND DECREED that Mary Anna Rivet, Minna Ree Winer, Edmond G. Miranne and Edmond G. Miranne, Jr. are permanently **ENJOINED** from relitigating in state court against Regions Bank of Louisiana; FSA, L.L.C.; Walter L. Brown, Jr.; and Perry S. Brown issues and claims that have been decided by order of the United States Bankruptcy Court in the Eastern District of Louisiana regarding the $5,000,000 collateral mortgage on the property known as the Bayou Plaza Hotel, recorded at MOB 2469, folio 3, Orleans Parish, Louisiana, and reinscribed in MOI 260602.

IT IS ORDERED, ADJUDGED, AND DECREED that Mary Anna Rivet, Minna Ree Winer, Edmond G. Miranne and Edmond G. Miranne, Jr. are permanently **ENJOINED** from enforcing the default judgment entered

in *Rivet v. Regions Bank*, No. 94-20050, the Civil District Court for the Parish of Orleans, State of Louisiana, against FSA, L.L.C.; Walter L. Brown, Jr.; and Perry S. Brown for $4,688,919.10 plus judicial interest and costs, and recognizing the second mortgage on the leasehold interest as it pertains to the property affected by the bankruptcy court's orders.

New Orleans, Louisiana, this 13 day of April, 1999.

/s/ Mary Ann Vial Lemmon
MARY ANN VIAL LEMMON
UNITED STATES DISTRICT
JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

REGIONS BANK OF LOUISIANA ET AL.	**CIVIL ACTION**
VERSUS	**NO: 98-2344**
MARY ANN RIVET ET AL.	**SECTION: "S" (4)**

ORDER AND REASONS

(Filed Apr. 13, 1999)

The following facts are found in this court's Order and Reasons of January 26, 1999, granting the preliminary injunction. There are no new material facts for the court's consideration.[1]

The case concerns the attempted enforcement in a state court action of a $5,000,000 second mortgage on certain real property located on Tulane Avenue in New Orleans, Louisiana. In 1957, the Browns, as owners of the property, executed a lease in favor of Pelican State Hotel Corporation. The leasehold estate[2] created by the lease was acquired by Tulane Hotel Investors Limited Partnership (THILP) on September 15, 1983. In connection with a

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[1] In their opposition to Regions Bank's motion for summary judgment, the Mirannes raise "new facts" concerning an attempt to cancel the inscription of the mortgage at issue. These facts are not material to the issue before the court in these cross motions for summary judgment relating to the permanent injunction.

[2] "Leasehold estate" is not a civilian term; however, it is used in all of the pleadings and documents referred to in this case.

loan, on the same date, THILP granted a $15,000,000 first mortgage on the leasehold estate in favor of First Financial Bank. On May 2, 1984, in connection with a second loan, THILP granted a $5,000,000 collateral mortgage (the second mortgage) on the leasehold estate securing a bearer note that was pledged to the Mirannes. The second mortgage, which was recorded in the public records of Orleans Parish on August 17, 1984, forms the basis of the dispute.

THILP filed for Chapter 11 bankruptcy on October 5, 1984. The bankruptcy was later converted to a Chapter 7 proceeding, and a trustee was appointed. *See Matter of Tulane Hotel Investors Limited Partnership*, No. 84-02145-K (Bankr. E.D.La. December 5, 1985). The trustee applied for court approval to sell the leasehold estate at public auction free and clear of all liens, including the second mortgage. The bankruptcy court advised all creditors and parties in interest of the sale and set a hearing on any objections for June 16, 1986. Edmond G. Miranne, Jr. appeared on his own behalf and on behalf of his father, Edmond G. Miranne, Sr., as holders of the second mortgage, and objected to the sale. On June 17, 1986, the bankruptcy court ordered the sale, "free and clear of all liens and encumbrances," including the second mortgage. The Orleans Parish Recorder of Mortgages was directed by the bankruptcy court to cancel and erase all liens, mortgages, and encumbrances bearing against the property.

The leasehold estate was sold by the trustee in bankruptcy at public auction to the first mortgage holder, First Financial Bank. The second mortgage was never canceled and remains on the public records.

Secor Bank succeeded First Financial Bank. Secor purchased the fee interest in the property from the Browns on December 29, 1993. Secor then sold the property to FSA, the current owner.

The Mirannes filed "Suit to Enforce Mortgage Via Ordinaria or Alternatively for Damages" in state court against Regions, Secor's successor; the Browns; and FSA, alleging that the Mirannes' superior rights under the second mortgage had been violated by the transactions. The defendants in the state action removed the suit to federal court based on federal question jurisdiction because the prior bankruptcy court orders had discharged the debt underlying the second mortgage. FSA filed an answer in federal court on February 7, 1995, and the Browns filed an answer on February 14, 1995. Regions filed a motion for summary judgment in lieu of an answer. The Mirannes filed a motion to remand. Judge Charles Schwartz denied the motion to remand, and granted summary judgment in favor of Regions, the Browns, and FSA.

The Court of Appeals affirmed the denial of the motion to remand in *Rivet v. Regions Bank of Louisiana, F.S.B.*, 108 F.3d 576 (5th Cir. 1997). Judge Jones dissented on grounds that the plaintiffs had no "essentially federal" claim to recharacterize because the claim rests on state law claims: "purported rights under a second mortgage and on transfers of property interests that allegedly abrogated those rights." *Id.* at 594. The Supreme Court reversed the decision of the Court of Appeals, and the case was remanded to state court. *See Rivet v. Regions Bank of La.*, 118 S. Ct. 921 (1998).

In his order of remand, Judge Schwartz enjoined any further proceedings in the state court, other than dismissal, regarding the issues previously litigated by the bankruptcy court, and ordered the Recorder of Mortgages "to cancel and erase the inscription from its records the Mortgage in the principal amount of $5,000,000." The Court of Appeals vacated the remand order and ordered the district court to remand the case to state court without commenting upon, ruling on, or issuing "any directives or orders as to, any issue or controversy in this case." The district court remanded the case to state court without further comment. The Clerk of Court forwarded only the order of remand to the state court, and the answers which had previously been filed were not forwarded.[3]

On October 27, 1998, the Mirannes filed a motion for summary judgment in state court against Regions, which has not yet been heard. On October 30, 1998, the Mirannes, premised on the failure of the Browns and FSA to file answers in the state court proceedings, entered preliminary defaults against FSA and the Browns and, on November 4, 1998, confirmed default judgments against the Browns for $4,688,919.10 plus judicial interest and costs, and recognizing the second mortgage on the leasehold estate.

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[3] 28 U.S.C. § 1447 provides that the clerk of court shall mail a certified copy of the order of remand to the clerk of court of the state court. Here, the clerk followed the rule requiring that the order of remand be forwarded, but did not forward any of the documents, including the answers, which had been filed in federal court between the date of removal and the date of remand.

The plaintiffs filed this action under the All Writs Act, 28 U.S.C. § 1651, and the relitigation exception to the Anti-Injunction Act, 28 U.S.C. § 2283, to obtain preliminary and permanent injunctions against further proceedings in state court, based upon the preclusive effect of the bankruptcy court's orders. This court issued a preliminary injunction enjoining the state court from relitigating against Regions the issues of the validity of the $5,000,000 collateral mortgage on the property and the discharge in bankruptcy of the underlying debt, and enjoining the state court from enforcing the default judgment entered in *Rivet v. Regions Bank*, No. 94-20050, the Civil District Court for the Parish of Orleans, against FSA, L.L.C.; Walter L. Brown, Jr.; and Perry S. Brown.

Regions Bank has filed a motion for summary judgment to enjoin permanently the Mirannes from prosecuting the lawsuit filed in state court to relitigate the issues resolved by the bankruptcy court's orders. The Browns and FSA have filed a motion for summary judgment to enjoin permanently the defendants from prosecuting the state lawsuit No. 94-20050, executing or enforcing the default judgment obtained on November 4, 1998, or initiating any other action to recover against FSA or the Browns based on the collateral mortgage or the debt underlying the mortgage, and requiring the Recorder of Mortgages to cancel the inscriptions of the default judgments from the records. The Mirannes have filed a motion for partial summary judgment seeking to dismiss the claims brought in federal court by FSA and the Browns. At the center of the controversy is the bankruptcy court's order to sell the property "free and clear of all liens and encumbrances."

DISCUSSION

Summary judgment is proper when, viewing the evidence in the light most favorable to the non-movant, "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." *Amburgey v. Corhart Refractories Corp.*, 936 F.2d 805, 809 (5th Cir. 1991); Fed. R. Civ. P. 56(c). If the moving party meets the initial burden of establishing that there is no genuine issue, the burden shifts to the non-moving party to produce evidence of the existence of a genuine issue for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 321 (1986). The nonmovant cannot satisfy his summary judgment burden with conclusory allegations, unsubstantiated assertions, or only a scintilla of evidence. *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc).

A permanent injunction may be granted if the plaintiff establishes 1) actual success on the merits, 2) irreparable injury if injunctive relief is not granted, 3) that the harm to the plaintiff would outweigh the harm the defendant would suffer if the injunction is granted, and 4) that the public interest would not be adversely affected by an injunction. *See A.W. Chesterton Co., Inc. v. Chesterton*, 128 F.3d 1, 5 (1st Cir. 1997). The standard for establishing actual success on the merits is higher than the standard to show likelihood of success on the merits at a hearing for a preliminary injunction. *See Smith v. Hightower*, 693 F.2d 359, 367 n.19 (5th Cir. 1982).

Federal courts have broad injunctive powers, including the power to protect their judgments under the All Writs Act, 28 U.S.C. § 1651. Federal courts are limited in

their power to enjoin state court proceedings by the Anti-Injunction Act, 28 U.S.C. § 2283. An exception to that limitation exists where necessary to prevent relitigation of a federal court judgment in state court.

"The Anti-Injunction Act is not a jurisdictional statute, but goes only to the granting of a particular form of equitable relief." *Mooney Aircraft Corp. (In re Mooney) v. Foster*, 730 F.2d 367, 372 (5th Cir. 1984). The basis for this court's jurisdiction is the ancillary proceeding doctrine of *Local Loan Co. v. Hunt*, in which the Supreme Court stated:

> That a federal court of equity has jurisdiction of a bill ancillary to an original case or proceeding in the same court, whether at law or in equity, to secure or preserve the fruits and advantages of a judgment or decree rendered therein, is well settled. And this, irrespective of whether the court would have jurisdiction if the proceeding were an original one. The proceeding being ancillary and dependent, the jurisdiction of the court follows that of the original cause, and may be maintained without regard to the citizenship of the parties or the amount involved.

These principles apply to proceedings in bankruptcy. 292 U.S. 234, 239-40 (1934) (internal citations omitted). *Hunt* supports the existence of jurisdiction for a federal court to issue an injunction to enforce an order of the bankruptcy court.[4] The burden is on the plaintiffs to

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[4] *But see Mooney*, 730 F.2d at 374 (no jurisdiction exists because the bankruptcy court's prior judgment did not affect the claims sought to be enjoined, which arose more than five years after the sale and more than a year after the bankruptcy

show that the injunction against the state court proceedings is necessary to effectuate the prior orders of the bankruptcy court. *See McQuaid (In re Federal Shopping Way, Inc.) v. Owners of "N.W.20" Real Estate*, 19 B.R. 747 (W.D. Wash. 1982).

In this case, the claim in the state court proceedings involves the same subject matter as the bankruptcy court's orders, which discharged the underlying debt, as well as ordering the sale of the leasehold "free and clear of all liens and encumbrances" and ordering the Recorder of Mortgages to cancel and erase all liens, mortgages, and encumbrances bearing against the leasehold. The Mirannes were the creditors for the underlying debt and holders of the security against the leasehold, and they asserted a claim at the time of the bankruptcy court's order of sale. The Mirannes received notice of the sale, and Edmond G. Miranne, Jr. appeared on behalf of the collateral mortgagees; they participated in the proceedings discharging the debt and authorizing the sale; and they objected to the sale. The Mirannes concede that the bankruptcy court's order is valid. *See Mooney*, 730 F.2d at 375 n. 7.

Accordingly, the district court in which the bankruptcy proceedings have transpired has jurisdiction to enjoin the state court action that is based on the collateral mortgage and the underlying debt because the action violates the order of the federal bankruptcy court. *See*

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estate was closed); *Matter of Federal Shopping Way, Inc.*, 717 F.2d 1264, 1270 (9th Cir. 1983) (*Hunt* did not support jurisdiction where prior judgment of bankruptcy court did not encompass claims sought to be enjoined).

Jacksonville Blow Pipe Co. v. Reconstruction Finance Corp., 244 F.2d 394 (5th Cir. 1957) (affirming the district court's summary judgment enjoining Jacksonville from prosecuting a suit in state court against the ultimate purchaser of a bankrupt's entire plant); *see also* 17 Wright, Miller, and Cooper, Federal Practice and Procedure: Jurisdiction 2d § 4106 (1988) (bankruptcy court acts pursuant to references from the district court). While it may have been preferable for the plaintiffs to have obtained the injunction prior to the time the state court rendered the default judgment or to have followed the procedure under Louisiana law to have the collateral mortgage canceled based on the bankruptcy court's order, the rendering of the state court judgment did not divest this court of subject matter jurisdiction to protect the integrity of the bankruptcy court's order.

The Mirannes argue that, because the bankruptcy court's order is not self-executing, the debt was "revived" when the right to invoke state procedural rules to cancel the collateral mortgage was not timely exercised. There is no authority for the Mirannes' proposition that a failure to exercise the right to cancel the mortgage in the state court nullifies the bankruptcy court's order and revives the underlying debt or the mortgage.[5] The underlying

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[5] That proposition is irreconcilable with the principle that recordation does not create rights (it is the mortgage, not its recordation, that creates rights), but merely preserves them against ineffectiveness towards third persons (if recordation is required to make them effective). *See* The Louisiana Law of Recordation: Some Principles and Some Problems, *William v. Redmann*, 39 Tul. L. Rev. 491, 495 (1965). Because recordation of an invalid document (e.g., a forged mortgage, or forged

debt was discharged by the bankruptcy court, the collateral mortgage was ordered to be canceled, and the

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mortgage release) cannot create rights, failure to cancel an invalid recordation equally cannot create rights.

Nor is the Mirannes' proposition supportable on the theory that a collateral mortgage is an exception to the rule that a mortgage is an accessory obligation, dependent upon an underlying valid principal obligation for its existence. *See* Collateral Mortgage, Max Nathan, Jr. and H. Gayle Marshall, 33 La.L.Rev. 497 (1973); La. Civ. Code art. 3282. Notwithstanding that collateral mortgage does not directly secure an existing debt, it does do so indirectly, by creating a fictitious mortgage note that is pledged as collateral security for a real debt (past, present, or future). That real debt is thus indirectly secured by the collateral mortgage. *See Thrift Funds Canal, Inc. v. Foy*, 260 So.2d 628, 630 (1972); *Texas Bank of Beaumont v. Bozorg*, 457 So.2d 667, 671 (La. 1984). The pledge of the collateral mortgage note is subject to La. Civ. Code art. 1771, which provides that a pledge is an accessorial obligation (which cannot exist without a primary obligation) and La. Civ. Code art. 3138, which provides that, if the obligation is null, so also is the pledge. In this case, of itself, the discharge of the debt evidenced by the hand note did not extinguish the collateral mortgage: but it did extinguish the pledge, and the pledgee's right to enforce mortgage note and mortgage. The mortgage became dormant when the real debt was discharged. If the real debt had been simply paid (rather than discharged by bankruptcy orders), the mortgage note could have been reissued in pledge *by its maker* to secure other debts. Reissue in pledge would have revived the collateral mortgage: but ordinarily with rank only from the date of the reissue. *See Odom v. Cherokee homes, Inc.*, 165 So.2d 855, 865 (La. Ct. App. 1964). No further exploration of this possibility is required here.

The discharge, coupled with the order of the bankruptcy court that the property described in the collateral mortgage be sold "free and clear . . . ," extinguished the pledge and made the collateral mortgage subject to erasure from the public records by following the procedure outlined by La. Rev. Stat. 9: 5166 and

Mirannes' rights under the mortgage have been extinguished. The Mirannes are foreclosed from challenging the validity of the bankruptcy court's ruling in any manner. The fact that the plaintiffs must take further steps under Louisiana law to erase the mortgage from the public records does not impact the integrity of the order of the bankruptcy court.

Additionally, there is a substantial threat that the plaintiffs will suffer irreparable injury if the Mirannes are allowed to proceed with the relitigation of the matters that have already been determined by the bankruptcy court. A permanent injunction does not injure the Mirannes who have always been aware of the bankruptcy court's order to discharge the underlying debt and to sell the property free and clear of the mortgage, but nevertheless attempted to obtain a judgment from the state court in flagrant disregard of the bankruptcy court's orders.

Accordingly, Regions, the Browns, and FSA have prevailed on the merits of their claims that the order of the bankruptcy court discharged the underlying debt and that they are entitled to have the Recorder of Mortgages cancel the inscriptions of the default judgments from the records upon complying with the procedural rules. There is no genuine issue of material fact, and the plaintiffs are entitled to judgment as a matter of law permanently enjoining any state court action addressing the same issues which were actually litigated in the bankruptcy

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9:5171. Any attempt at enforcing the hand note, the collateral mortgage note, or the collateral mortgage itself, was in flagrant disregard of the bankruptcy court's order.

court. The defendants' motion for summary judgment on the same issue is denied.

The court, therefore, issues the following orders:

The plaintiffs' motions for summary judgment are GRANTED.

The Mirannes are permanently ENJOINED from relitigating in state court against Regions, the Browns, and FSA issues and claims that have previously been decided by the bankruptcy court.

The Mirannes are permanently ENJOINED from enforcing the default judgment against the Browns and FSA for $4,688,919.10 plus judicial interest and costs, and recognizing the second mortgage on the leasehold interest as it pertains to the property affected by the bankruptcy court's orders.

The defendants' motion for summary judgment is DENIED.

New Orleans, Louisiana, this 13 day of April, 1999.

Mary Ann Vial Lemmon
MARY ANN VIAL LEMMON
UNITED STATES DISTRICT
JUDGE

FILED
DEC 22 2000
OFFICE OF THE CLERK

No. 00-839

IN THE

Supreme Court of the United States

MARY ANNA RIVET, *et al.*,

Petitioners,

v.

REGIONS BANK, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does a federal district court have the power and discretion under the All Writs Act and the relitigation exception to the Anti-Injunction Act to enjoin former mortgage holders from prosecuting a state court action to enforce a mortgage that a prior federal judgment expressly extinguished by means of a sale free and clear of liens and encumbrances pursuant to 11 U.S.C. § 363(f), after notice to the mortgage holders and a hearing at which the mortgage holders were represented?

LIST OF PARTIES AND RULE 29.6 STATEMENTS

1. Mary Anna Rivet

2. Minna Ree Winer

3. Edmund G. Miranne

4. Edmund G. Miranne, Jr.

5. Regions Bank, a wholly-owned subsidiary of Regions Financial Corporation

6. FSA, L.L.C., a limited liability company whose members are Northern Management and Financial, L.P., Roland von Kurnatowski, Bayou Plaza Development, L.L.C., Michael D. Aufrecht and Storage Trust Properties, L.P.

7. Walter L. Brown, Jr.

8. Perry S. Brown

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The respondents, Regions Bank, Walter L. Brown, Jr., Perry S. Brown and FSA, L.L.C., respectfully request that the Court deny the petition for a writ of certiorari seeking review of the Fifth Circuit's opinion in this case. That opinion is reported at 224 F.3d 483 (2000).

STATEMENT OF THE CASE

The court of appeals affirmed a district court's injunction, issued under the All Writs Act and the relitigation exception to the Anti-Injunction Act, that prevents the relitigation in state court of an issue that was litigated and conclusively determined in a bankruptcy court proceeding in 1986. The issue was a routine one in bankruptcy cases — whether a leasehold interest included in the bankruptcy estate, over which the bankruptcy court had exclusive jurisdiction pursuant to 28 U.S.C. § 1334(e), would be sold by a Chapter 7 trustee free and clear of liens and encumbrances pursuant to 11 U.S.C. § 363(f).[1] After notice to the petitioners and two hearings at which the petitioners were represented by counsel, the bankruptcy court entered orders authorizing and approving the sale.[2] Both orders decreed that the sale would be free and clear of liens and encumbrances, expressly including a second mortgage in favor of the petitioners. In reliance on the orders, the sale was consummated in 1986. In 1993, the purchaser of the leasehold interest acquired fee ownership of the leased property, causing the leasehold interest to be extinguished by operation of law. (Pet. App. at 4-5) The purchaser then sold the fee ownership interest to a third party.

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1. The debtor was a bankrupt partnership owned and controlled by the petitioners. (Pet. App. at 2)

2. The bankrupt partnership appealed both orders and the appeals were dismissed. (Pet. App. at 3)

Seven years after the bankruptcy sale, the petitioners filed a state court action to enforce the second mortgage that had been stripped from the leasehold interest by the bankruptcy court orders. The respondents initially removed the action to federal court and obtained its dismissal on *res judicata* grounds. The dismissal was affirmed by the Fifth Circuit, but reversed by this Court on the ground that removal jurisdiction was lacking. In so ruling, the Court noted "that under the relitigation exception to the Anti-Injunction Act, 28 U.S.C. § 2283, a federal court may enjoin state-court proceedings 'where necessary . . . to protect or effectuate its judgments.' " *Rivet v. Regions Bank of Louisiana*, 522 U.S. 470, 478 n.3, 118 S. Ct. 921, 926, 926 L. Ed. 2d 912 (1998).

After the petitioners' action was remanded to state court, the respondents brought this action under the All Writs Act and the relitigation exception to the Anti-Injunction Act to enjoin the petitioners from prosecuting their state court action. The district court entered a judgment that enjoined the petitioners "from relitigating in state court against [the respondents] issues and claims that have been decided by [the bankruptcy court orders]." (Pet. App. at 26). Utilizing the standards provided in *Chick Kam Choo v. Exxon Corporation*, 486 U.S. 140, 108 S. Ct. 1684, 100 L. Ed. 2d 127 (1988), the court of appeals affirmed, concluding that the relitigation exception applied because the petitioners' "state court action necessarily requires relitigation of the precise question resolved by the bankruptcy action, i.e., the survival of the [petitioners'] mortgage as an encumbrance on the leasehold estate." (Pet. App. at 16)[3]

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3. The Fifth Circuit's opinion also reluctantly reversed a portion of the district court's judgment that had enjoined the petitioners from attempting to enforce default judgments entered in the state court proceeding. (Pet. App. at 17-25) The petition does not seek review of that aspect of the Fifth Circuit's decision. (Pet. at 8 n.5)

REASONS FOR DENYING THE WRIT

The Fifth Circuit's decision is based on a straightforward application of settled legal principles that have little or nothing to do with the issues that the petitioners seek to raise. The questions presented to the court of appeals were whether "the relitigation exception to the Anti-Injunction Act applies to this case" (Pet. App. at 8), and whether "the principles of equity, comity, and federalism supported [the] issuance of an injunction." (Pet. App. at 9) In answering the first question, the court applied the familiar four-point test for determining claim preclusion, with the additional requirement of *Chick Kam Choo* that "the claims or issues that the federal injunction is to insulate from litigation in state proceedings 'actually have been decided by the federal court.' " (Pet. App. at 9) The court rejected the petitioners' "argument that the questions they raise in their state-court action are different from those resolved by the bankruptcy court," concluding that the petitioners' "state court-action necessarily requires relitigation of the precise question resolved by the bankruptcy action, i.e., the survival of the [petitioners'] mortgage as an encumbrance on the leasehold estate." (Pet. App. at 13-16) With regard to the second question, the court rejected the petitioners' argument "that the district court's actions impermissibly encroach on state sovereignty," citing Congress' constitutional authority "to establish procedures for the transfer of [property] interests within the context of bankruptcies." (Pet. App. at 17 n.14)

The petitioners seek review of this unremarkable and uncontroversial ruling by attempting to manufacture issues that are unnecessary to the application of the relitigation exception to the Anti-Injunction Act. First, the petitioners argue that prior decisions of this Court require, as a matter

of federal law, that the bankruptcy court orders first be "domesticated" through enforcement in the Louisiana courts before they can be protected by an injunction under the relitigation exception to the Anti-Injunction Act. Second, the petitioners argue that the Fifth Circuit's ruling, by recognizing the preclusive effect of the bankruptcy court orders in the absence of their state court enforcement, conflicts with this Court's prior decisions concerning the doctrine of preemption. Third, the petitioners argue that the Fifth Circuit's decision violates principles of state sovereignty under this Court's prior rulings. These arguments have no merit and are unworthy of this Court's plenary consideration pursuant to Rule 10.

I.

THE ABSENCE OF STATE COURT ENFORCEMENT OF THE BANKRUPTCY COURT ORDERS IS IMMATERIAL TO THE INJUNCTION ISSUED IN THIS CASE.

The enforcement of the bankruptcy court orders simply is not an issue in this case. The injunction affirmed by the Fifth Circuit did not purport to enforce these orders; rather, it merely recognized that, for purposes of the relitigation exception, the orders have preclusive effect between the parties concerning issues and claims actually litigated in the bankruptcy proceeding. No decision of this Court or of the Fifth Circuit can be read to require that the orders first be domesticated through state court enforcement before being given this recognition under the relitigation exception. On the contrary, the decisions of this Court preclude the petitioners' collateral attack on final bankruptcy court orders concerning matters over which the bankruptcy court had exclusive jurisdiction.

A. The injunction does not enforce the bankruptcy court orders, but merely recognizes their preclusive effect.

The petition fails to recognize that there is an important distinction between enforcing a judgment, on the one hand, and recognizing its preclusive effect, on the other. Many judgments require enforcement in order to have practical effect. For example, a money judgment in favor of a plaintiff in a personal injury case may have no economic value unless it is enforced against the defendant through execution. However, even if that money judgment is never enforced through execution, it still will have preclusive effect between the litigants as to all issues and claims that were litigated.[4] The injunction in this case (Pet. App. at 26) merely recognized that the bankruptcy court orders, regardless whether they were or should have been "domesticated" in Louisiana, preclude the petitioners from relitigating against the respondents the issue of whether the petitioners' second mortgage would continue to encumber the leasehold interest after its sale by the trustee. Because this issue was actually litigated in the bankruptcy proceeding, the injunction was properly issued pursuant to the relitigation exception in accordance with the standards of *Chick Kam Choo*.

The petitioners' reliance on *Baker by Thomas v. General Motors Corporation*, 522 U.S. 222, 118 S. Ct. 657, 139 L. Ed. 2d 580 (1998), is misplaced. The issue in *Baker* was whether a Missouri federal court, in the course of adjudicating a state law tort suit, was constitutionally

---

4. A judgment in favor of the defendant, of course, would never be enforced by a court. Nevertheless, it also would have preclusive effect as to all matters actually litigated and be entitled to protection under the relitigation exception. This was the situation in *Chick Kam Choo*.

required to give full faith and credit to a consent injunction issued by a Michigan state court in a separate lawsuit between different parties and involving different issues. If enforced by the Missouri court, the injunction would have precluded a witness from testifying in the Missouri case. Not surprisingly, this Court held that the Michigan injunction was not entitled to full faith and credit because "[m]ost essentially, Michigan lacks authority to control courts elsewhere by precluding them, in actions brought by strangers to the Michigan litigation, from determining for themselves what witnesses are competent to testify and what evidence is relevant and admissible in their search for the truth." 522 U.S. at 238, 118 S. Ct. at 666. In reaching this conclusion, however, the Court recognized that the Michigan injunction still was claim preclusive between the parties to the Michigan litigation and "could operate against [the enjoined party] to preclude him from *volunteering his testimony*." *Id.* at 239, 118 S. Ct. at 667 (emphasis in original).

Unlike *Baker*, this case does not involve a demand that a state court enforce the bankruptcy court orders under the Full Faith and Credit Clause. It simply involves an effort by the court that issued the orders to effectuate their preclusive effect by enjoining the petitioners from attempting to relitigate an issue decided by the orders. Neither *Baker*, nor any other decision of this Court, precludes this result.

B. The bankruptcy court orders do not require state court enforcement to be effective.

The petitioners' contention that "[a]ll judgments must be enforced" (Pet. at 10) simply is wrong. Pursuant to 28 U.S.C. § 1334(e), the bankruptcy court, as an adjunct to

the district court, had exclusive jurisdiction over all of the property of the bankruptcy estate, including the leasehold interest. Pursuant to 11 U.S.C. § 363(f), that court, and that court alone, had the power to decree that the sale of the leasehold interest would be free and clear of all liens and encumbrances. *See In re United States Brass Corp.*, 110 F.3d 1261, 1268 (7th Cir. 1997) ("Section 1334(d) [now § 1334(e)] gives the bankruptcy court control of all the property. Creditors who want to enforce their liens have to do so in that court regardless of the location of the creditor or the property.") Because the bankruptcy court had this exclusive jurisdiction, its orders were conclusive "as to all persons in the world" concerning which, if any, encumbrances would continue to affect the leasehold interest following its sale by the bankruptcy trustee. Restatement of the Law of Judgments, 2d, § 30, Comment A. (American Law Institute 1982). Once the sale occurred, the purchaser and its successors in interest were forever protected from claims by former lien holders, whose sole remedy was to look to the proceeds, if any, of the sale. 11 U.S.C. § 363(m); *Silverman v. Ankari (In re Oyster Bay Cove)*, 196 B.R. 251 (E.D.N.Y. 1996); *In re Lady H. Coal Co.*, 193 B.R. 233 (Bankr. S.D.W. Va. 1996).

Applying these principles, the court of appeals properly rejected the petitioners' argument that the bankruptcy court orders required further enforcement pursuant to state law in order to be effective. The court held that the bankruptcy court orders were self-executing, noting that, if the law were otherwise, "it would seemingly be impossible to have the liens attach to the sale proceeds," as specified by the orders themselves. (Pet. App. at 15). The petitioners offer no relevant legal authority, from this Court or any other, that conflicts with this ruling.

On the contrary, it is the petitioners' state court action, which collaterally attacks the bankruptcy court orders, that conflicts with the decisions of this Court. In *Celotex Corp. v. Edwards*, 514 U.S. 300, 313, 115 S. Ct. 1493, 1501, 131 L. Ed. 2d 403 (1995), this Court criticized collateral attacks on bankruptcy orders for "seriously undercutting the orderly process of the law." This is particularly true with respect to an order that authorizes the sale of property pursuant to Section 363. "Unless bankruptcy sales are final when made, rather than being subject to being ripped open years later, high prices will not be offered for the assets of bankrupt firms." *Matter of Met-L-Wood Corp.*, 861 F.2d 1012, 1019 (7th Cir. 1988), *cert. denied*, 490 U.S. 1006, 109 S. Ct. 1642, 104 L. Ed. 2d 157 (1989). *See In re Edwards*, 962 F.2d 641, 643 (7th Cir. 1992) ("If purchasers at judicially approved sales of property of a bankrupt estate, and their lenders, cannot rely on the deed that they receive at the sale, it will be difficult to liquidate bankrupt estates at positive prices."). Any requirement that a Section 363(f) sale order be "domesticated" through enforcement pursuant to state law procedures in order to have effect would severely undermine the federal courts' exclusive jurisdiction over bankruptcy cases and property of bankruptcy estates. It also would seriously diminish the ability of a debtor-in-possession or trustee to sell property of the estate on favorable terms.

A large bankruptcy case may involve property in all fifty states. In the petitioners' view, a bankruptcy court's order authorizing the transfer of free and clear title to property located in multiple states would be ineffective in any state in which it was not "domesticated" through enforcement pursuant to that state's procedures. The grant of power to Congress under Article I of the United States Constitution to "establish uniform laws on the subject of bankruptcies

throughout the United States" precludes this result. *International Shoe Co. v. Pinkus*, 278 U.S. 261, 265, 49 S. Ct. 108, 110, 73 L. Ed. 318 (1929). ("The power of Congress to establish uniform laws on the subject of bankruptcies throughout the United States is unrestricted and paramount. . . . The national purpose to establish uniformity necessarily excludes state regulation. . . . States may not pass or enforce laws to interfere with or complement the Bankruptcy Act or to provide additional or auxiliary regulations.")

II.

THE PREEMPTION ISSUE RAISED BY THE PETITION DOES NOT EXIST.

The petitioners' contention that the Fifth Circuit's ruling ignores this Court's decisions by failing to "engage in a careful and rigorous analysis under the doctrine of preemption" (Pet. at 16) misstates the limited scope and effect of the ruling. The court of appeals' ruling did not "sweep aside" state laws and mandate "that, in effect, they do not exist." (Pet. at 15-16) On the contrary, the Fifth Circuit properly avoided reaching a constitutional preemption issue through its reasoned conclusion that the state statutes at issue do not apply to the bankruptcy court orders.[5]

The Chapter 7 trustee's sale of the leasehold interest did not itself extinguish or otherwise affect the petitioners'

5. The decisions of this Court long have recognized that the federal courts have a duty to avoid decisions of constitutional questions, particularly when the question turns on uncertainty in the construction of state law. *See, e.g., Rescue Army v. Municipal Court of Los Angeles*, 331 U.S. 549, 67 S. Ct. 1409, 91 L. Ed. 1666 (1947).

second mortgage. Rather, it was the bankruptcy court orders, which approved and confirmed the sale, that decreed that the sale would be free and clear of all liens and encumbrances, expressly including the petitioners' second mortgage. This distinction is important because La. R.S. 9:5031 and La. R.S. 9:5251, by their plain language, purport to limit only the effect of bankruptcy *sales*, not of bankruptcy *orders*. The Fifth Circuit properly construed the plain language of the state statutes to avoid rather than seek a conflict with federal law.

The Fifth Circuit's reading of La. R.S. 9:5031 and La. R.S. 9:5251 recognizes that not all sales in bankruptcy are ordered to be made free and clear of liens and encumbrances. Thus, when a bankruptcy sale is made subject to existing liens and encumbrances, La. R.S. 9:5031 and La. R.S. 9:5251 serve to assure that the sale itself will not be deemed to affect them.

This reading of La. R.S. 9:5031 and La. R.S. 9:5251 also is consistent with other provisions of Louisiana law that give effect to foreign judgments without requiring their domestication through enforcement under state law. For example, La. R.S. 13:4204 permits a Louisiana federal court judgment to be recorded in the mortgage records, thereby creating a judicial mortgage against the property of the judgment debtor, without any necessity that the judgment first be "domesticated" through state court enforcement. Similarly, Louisiana Civil Code Article 3337, without any mention of a requirement for state court "domestication" of a foreign judgment, directs the recorder to cancel or erase a mortgage from his records when "[t]he cancellation or erasure is ordered by a judgment." The petitioners offer no compelling reason why La. R.S. 9:5031 and La. R.S. 9:5251,

contrary to their plain language, should be read to impose a requirement of domestication, particularly in the context of a bankruptcy court order affecting property over which the bankruptcy court had exclusive jurisdiction.

There is no preemption issue in this case because there is no necessary conflict between federal bankruptcy law and the state statutes upon which the petitioners rely. Accordingly, the decisions of this Court requiring "a careful and rigorous analysis under the doctrine of preemption" (Pet. at 16) are inapposite.

III.

THE FIFTH CIRCUIT'S RULING DOES NOT COMPROMISE STATE SOVEREIGNTY.

The petitioners' argument that the Fifth Circuit's ruling elevates the bankruptcy court orders into "super judgments" that will run rampant over Louisiana's property laws in contravention of this Court's decisions is completely unfounded. The legal premise on which this argument is based — that public record inscription creates substantive rights[6] — simply is false. The continued inscription of the petitioners' second mortgage on the public record has never been determinative under Louisiana law as to whether the mortgage ever had, or would continue to have, substantive effect.

It is black letter law in Louisiana that public recordation does not create any rights or obligations, but merely notifies

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6. The petitioners state, for example, that "[i]n Louisiana, as long as a mortgage is recorded and not erased, that mortgage is conclusively presumed to exist in the eyes of the State." (Pet. at 21)

third parties that such rights or obligations may exist. *Phillips v. Parker*, 483 So. 2d 972, 975 (La. 1986);[7] *Coldwell Banker J. Wesley Dowling & Assoc. v. City Bank & Trust*, 602 So. 2d 1051, 1053 (La. App. 2d Cir. 1992); *Gulf South Bank & Trust Co. v. Demarest*, 354 So. 2d 695, 697 (La. App. 4th Cir. 1978); William V. Redmann, The Louisiana Law or Recordation: Some Principles and Some Problems, 39 Tul. L. Rev. 491, 495 (1915). In particular, recordation "is neither proof nor promise of the validity of the recorded or written instrument, which alone can be the source of the rights asserted." *Gulf South Bank & Trust Co.* 354 So. 2d at 697. Thus, the recordation of a forged document does not make the document valid. *Id.* at 697-98. Nor does a recorded mortgage create a right to foreclose absent the existence of an underlying obligation. *First Guaranty Bank v. Alford*, 366 So. 2d 1299, 1302-03 (La. 1978).

Applying these principles to the same facts presented here, the Fifth Circuit panel that decided *Rivet v. Regions Bank of Louisiana*, 108 F.3d 576, 589 (5th Cir. 1997), *rev'd on other grounds*, 522 U.S. 470, 118 S. Ct. 921, 139 L. Ed. 2d 912 (1998), concluded that "the existence of the uncancelled inscription of the second mortgage on the public records could not keep the mortgage itself legally viable after the obligation it secured — the collateral mortgage note — as well as the mortgage, were terminated in the bankruptcy of the maker/mortgagor, THILP." The same principle holds true for the petitioners' arguments that the reaffirmation and reinscription of the second mortgage somehow resurrected the mortgage obligation. Reaffirmation does not create any

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7. The petitioners' citation of this case in support of their contrary argument demonstrates the unreliability of the petitioners' position. (Pet. at 21)

greater rights than existed in the instrument originally. Likewise, reinscription of an invalid instrument cannot create rights. *Gulf South Bank & Trust Co.*, 354 So. 2d at 697-98; *First Guaranty Bank*, 366 So. 2d at 1302-03.

Contrary to the petitioners' assertions,[8] the Fifth Circuit's decision properly recognizes and can only serve to reinforce these principles of Louisiana's public records doctrine. The decision recognizes that public record inscriptions are intended to put third parties on notice that rights may exist, but that they are not intended to be conclusive as to the existence of any rights. The facts of this case provide a good example. The public record reflects the following relevant inscriptions:

(1) the original lease;

(2) the two mortgages against the leasehold interest;

(3) the bankruptcy trustee's sale of leasehold interest, along with the bankruptcy court orders decreeing that the sale would be free and clear of all liens and encumbrances including the petitioners' second mortgage;

(4) the subsequent termination of the leasehold interest when its owner later purchased the fee interest in the leased property; and

(5) the reaffirmation and reinscription of the second mortgage.

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8. The petitioners assert, for example, that upholding the Fifth Circuit's ruling will mean that "no one may ever again peruse Louisiana's mortgage records with any confidence that they are accurate." (Pet. at 22)

A third party perusing these inscriptions would have adequate notice to inquire further before relying on the substantive effect of any of the recorded instruments.[9]

The Fifth Circuit's decision cannot raise Eleventh Amendment concerns because neither the State of Louisiana State nor any of its officials have been sued or are affected in any way by the district court's injunction.[10] It does not compel the state to do, or not to do, anything. The sole effect of the injunction affirmed by the Fifth Circuit is to restrain the petitioners from attempting to relitigate in their state court action an issue that already was litigated and decided in the bankruptcy court proceeding. The injunction serves only to effectuate the preclusive effect of the bankruptcy court orders against the petitioners.

CONCLUSION

The petition fails to provide a compelling reason for the invocation of the Court's discretion pursuant to Rule 10. The Fifth Circuit's ruling does not conflict with any decision of this Court or of any court of appeal concerning an issue of importance. Accordingly, the Court should deny the petition for a writ of certiorari.

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9. The petitioners, of course, are not third parties and have always had actual knowledge of these transactions.

10. The Eleventh Amendment, of course, would not prohibit a suit in federal court to compel a state recorder of mortgages to comply with federal law. *See Ex parte Young*, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908).

Respectfully submitted,

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(3)

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No. 00-839

In The

Supreme Court of the United States

MARY ANNA RIVET, MINNA REE WINER, EDMOND G. MIRANNE, and EDMOND G. MIRANNE, JR.,

Petitioners,

versus

REGIONS BANK, WALTER L. BROWN, JR., PERRY S. BROWN, and FSA, L.L.C.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF THE STATE OF LOUISIANA, AS *AMICUS CURIAE*, SUPPORTING THE PETITION FOR WRIT OF *CERTIORARI*

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QUESTIONS PRESENTED

(1) Must a federal bankruptcy court's order affecting property rights in Louisiana be domesticated and enforced according to the statutes of the State of Louisiana, or may those statutes be completely ignored on the theory that the judgment is somehow "self-executing"?

(2) May a federal bankruptcy court order be so construed as to necessarily result in erroneous and inaccurate entries being maintained in the Louisiana public records, thereby irreparably damaging the integrity of the public records of the State of Louisiana?

LIST OF PARTIES

The State of Louisiana has no knowledge of any parties to the proceedings in the Court whose judgment is sought to be reviewed here other than those whose names appear either in the caption of the case or in the section entitled "List of Parties" in the Petition for a Writ of Certiorari. *See, Petition for Writ of Certiorari,* at ii.

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TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

MAY IT PLEASE THE COURT,

The State of Louisiana, as *Amicus Curiae*, through its Attorney General, hereby supports the Petition for a Writ of *Certiorari* in this matter, and respectfully prays that a Writ of Certiorari issue to review the Opinion and Judgment of the United States Court of Appeals for the Fifth Circuit entered in this matter on August 22, 2000.

OPINIONS BELOW

The Opinion and Judgment of the three-judge panel of the United States Court of Appeals for the Fifth Circuit was entered August 22, 2000, and is reported as *Regions Bank of Louisiana v. Rivet*, 224 F.3d 483 (5th Cir. 2000). The Opinion is also reprinted in the Appendix to the Petition for a Writ of *Certiorari* (hereinafter *"Petition"*), at pages A-1 through A-25. The Judgment and Order and Reasons of the United States District Court for the Eastern District of Louisiana, entered April 14, 1999, are reprinted in the Appendix to the *Petition* at pages A-25 through A-39. For briefing purposes, the term "opinion below" will refer to the Fifth Circuit's opinion.

STATEMENT OF JURISDICTION

The judgment of the oral argument at the United States Court of Appeals for the Fifth Circuit was entered on August 22, 2000, affirming in part and reversing in part the Order and Reasons of the United States District Court for the Eastern District of Louisiana, dated April 13, 1999. The jurisdiction of this Court is invoked by the Petition under 28 U.S.C. § 1254(1). This Brief is filed on behalf of the State of Louisiana, as *Amicus Curiae*, by its Attorney General, pursuant to Rule 37.4 of the Rules of the Supreme Court of the United States.

INTEREST OF THE STATE OF LOUISIANA AS *AMICUS CURIAE*

The State of Louisiana has a direct and specific interest in the resolution of the matters raised in this case in two respects:

(1) to ensure that the State's valid statutory enactments may not be ignored on the basis of the appellate court's interpretation that an order by a federal bankruptcy court is "self-executing" upon entry, and therefore that Louisiana's statutes relating to domestication and enforcement of such judgments may be ignored; and

(2) to ensure that the integrity of the State's public records is not compromised by the appellate court's interpretation of the effect of the entry of an order by a federal bankruptcy court.

The State of Louisiana also appeared as *Amicus Curiae*, in the United States Court of Appeals for the Fifth Circuit, to assert these same interests.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to those Constitutional and statutory provisions set forth in the Petition (*Petition*, at 2-4), the State believes that this case also involves the following provision of the United States Code, which is set forth in pertinent part:

Title 28 U.S.C. § 1738:

> The Acts of the legislature of any State . . . of the United States . . . [and] The records and judicial proceedings of any court of any such State . . . [when] authenticated [pursuant to this Act], shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State- . . . from which they are taken.

STATEMENT OF THE CASE

I. Basis for Federal Jurisdiction in the Court of First Instance

This action was originally commenced by Respondents pursuant to The Anti-Injunction Act, 22 U.S.C. § 2283, and The All Writs Act, 22 U.S.C. § 1651.

II. Statement of the Facts

The State of Louisiana hereby adopts the Statement of Facts contained in the Petition for a Writ of Certiorari. *See Petition*, at 4-8.

III. Course of proceedings and disposition in the Court below.

The State of Louisiana hereby adopts the statement of these items as contained in the Petition for a Writ of Certiorari. *See Petition*, at 4-8.

IV. The Opinion Below.

Similarly, the State of Louisiana concurs in Petitioners' description of the opinion below. *See Petition*, at 8-9. In addition, Louisiana believes that the following aspects of the opinion below will be of particular importance when considering the Petition for a Writ of *Certiorari*:

1. The opinion below creates a unique species of self-executing judgment, which finds no precedential support in any reported opinion. *Petition*, at A-11 to A-15, 224 F.3d at 490-491.

2. The opinion below effectively invalidates two Louisiana statutory enactments, La. R.S. 9:5251 and 9:5031, with no finding that they are unconstitutional, or that they have been preempted by an Act of Congress. *Petition*, at A-11 to A-15, and nn. 10 & 11; 224 F.3d at 490-491, nn. 10 & 11.

3. The opinion below invalidates, at least in part, Louisiana's statutory scheme for the domestication and enforcement of foreign judgments – also with no finding of unconstitutionality and no preemption analysis – by the unwarranted expedient of assuming that all items which might otherwise be determined by a State judge at a domestication hearing will have been conclusively decided by the rendering court. *Petition*, at A-11 to A-15, 224 F.3d at 490-491.

ARGUMENT FOR ALLOWANCE OF THE WRIT

I. Summary of Argument.

Stated succinctly, there are two basic reasons why the State of Louisiana believes that a Writ of Certiorari should be granted to review the opinion below, and that the decision should be vacated: (1) Louisiana cannot accept a situation where the order of a federal bankruptcy court is held to authorize private parties to ignore the State's valid statutory enactments. (2) The State of Louisiana cannot accept a situation where the issuance of a federal bankruptcy order is interpreted so as to compromise the integrity of the State's public records.

The opinion below has the effect of invalidating a State statutory scheme regulating both the domestication and enforcement of foreign judgments, including federal judgments, in Louisiana as well as the existence of liens and mortgages on Louisiana real property interests following the entry of the sale order of a federal bankruptcy court. The statutory scheme in question – consisting of La. R.S. 9:5031 and 9:5251; La. R.S. 13:4241 and 13:4242; and La. C.C.P. art. 2541 – is a hybrid. On the one hand this scheme is part of the State's system of regulating real property interests. La. R.S. 9:5031 and 9:5251. On the other hand it consists of the means by which the State provides for the domestication and enforcement of

foreign judgments in Louisiana.[1] Louisiana has a vital interest in both of these aspects of its statutory scheme and cannot accept a situation such as the one created by the opinion below, unless and until this validly enacted statutory scheme is held to have been preempted by the United States Congress. Heretofore, such preemption has not been found, and the opinion below does not even engage in a preemption analysis before it implicitly sweeps aside these legislative enactments.

In addition, the opinion below will inevitably have the effect – perhaps unintended, but nevertheless very pointed – of compromising, if not destroying, the integrity of the public records of Louisiana. If the integrity of Louisiana's public records remains thus compromised, the very foundation of Louisiana's entire civil-law system of property holding will also be called into question. Thus, not only is the integrity of Louisiana's public records at issue, but the opinion also infringes impermissibly on Louisiana's right, secured by the Tenth Amendment, to regulate the real property within her borders.

Conversely, no legitimate federal interest, nor any interest secured by the Bankruptcy Code, is served by the opinion below. Louisiana does not question the right of a bankruptcy court to enter an order, pursuant to the Bankruptcy Code, mandating that property of a bankrupt estate be sold free and clear of liens and encumbrances, nor does it question the effectiveness of that order as between the parties thereto. Rather, the Louisiana statutory scheme merely places such orders in the same position as all other federal judgments, as well as all sister-state judgments, by requiring that the rights granted thereunder must be secured through the remedy of domestication and enforcement of the judgment in Louisiana.

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[1] In conformity with the Uniform Enforcement of Foreign Judgments Act (revised 1964), La. R.S. 13:4241 defines the term "foreign judgment" to include all federal judgments.

II. The State of Louisiana cannot accept a situation where its valid statutory enactments are simply ignored based upon the entry of a bankruptcy court order.

La. R.S. 9:5031 and 9:5251 clearly mandate that no mortgage or other form of security interest in Louisiana real property may be "in any manner affected", as the result of a sale in bankruptcy, except through the domestication and enforcement in Louisiana of the bankruptcy order and judgment. La. R.S. 13:4241 and 13:4242, and La. C.C.P. art. 2541, provide a clear and orderly procedure for the domestication and enforcement in Louisiana of all foreign judgments, including federal bankruptcy judgments. The effect of the decision below is, by judicial *fiat*, to invalidate completely La. R.S. 9:5031 and 9:5251, and to invalidate at least partially La. R.S. 13:4241 and 13:4242, and La. C.C.P. art. 2541.

The State of Louisiana concurs with Petitioners that such invalidation of the valid legislative enactments of a State may not be accomplished by the federal courts, absent a ruling that the statutes are unconstitutional or that they have been preempted by an Act of Congress. *See Petition*, at 15-19. The State also concurs in Petitioner's assessment of the decision below that no such rulings have been made. *Id.*[2] In the interest of brevity, these

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[2] The opinion below did not engage in a preemption analysis. It simply dismisses that doctrine by holding, in essence, that Louisiana's system of domestication and enforcement did not need to be preempted since Respondents "did not need to take further steps to 'execute' the bankruptcy court's orders". *Petition*, at A-14 to A-15, 224 F.3d at 491. This ruling, however, embodies the very essence of preemption. The Louisiana statutory scheme clearly mandates that the bankruptcy order *did* have to be executed through domestication and enforcement. This scheme is rendered nugatory through the creation of a species of "self-executing" judgment based upon the Bankruptcy Code. *See Petition*, at

arguments will not be repeated. The purpose of this brief is to add Louisiana's voice to Petitioner's request for a Writ of *Certiorari*, and to request that the decision below be vacated. The purpose of this section is to present the interest of the State of Louisiana underlying its statutory scheme for the domestication and enforcement of foreign judgments. The State deems this discussion to be necessary, because of the short shrift given this position by the opinion below. *See Petition*, at A-12 to A-14, and 224 F.3d at 491.

Louisiana agrees with Petitioners that this case should be controlled by the analysis of *Baker by Thomas v. General Motors Corp.*, ___ U.S. ___, 118 S.Ct. 657, 664-665, 668 (1998) (Ginsburg, J.) (Scalia, J., concurring), a case and an issue which the opinion below declines even to discuss, despite extensive briefing by Petitioners and the State as *Amicus*. Thus, the opinion below fails to recognize the most basic principle in the law of judgments: the dichotomy between right and remedy. A judgment declares rights, but those rights must be secured through

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12-15. Thus, the Louisiana statutory scheme is invalidated by a ruling under the Bankruptcy Code, and that, by any other name, is preemption. Yet, the opinion below expressly disavows even any attempt at a preemption analysis, merely stating the obvious precept that "[P]reemption *may be implied* if state and federal laws conflict. . . . ". *Petition*, at A-14, n. 13, 224 F.3d at 491. This passing reference, however, falls far short of the rigorous analysis required by this Court's precedents in order to decide whether or not a state statute has been preempted by an Act of Congress. *See, e.g., Davis v. Davis (In re Davis)*, 170 F.3d 475, 482, 483 (5th Cir.) (*en banc*) (Jones, J.), *cert. denied*, 120 S.Ct. 67 (1999). *Petition*, at 15-19. Even if such an analysis were to be undertaken, it cannot rationally be said that the Louisiana statutory scheme in question "thwarts the 'accomplishment and execution' of Congressional intent", as expressed in the Bankruptcy Code. *See Davis v. Davis, supra*, 170 F.3d at 483, *quoting, Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Dev. Comm'n*, 461 U.S. 190, 204, 103 S.Ct. 1713, 1722, 75 L.Ed.2d 752 (1983).

the remedy of enforcement. This principle has long been recognized by the decisions of this Court, which, in 1873, for example, held that:

> "No execution can issue upon [foreign] judgments without a new suit in the tribunals of other states. And they enjoy not the right of priority or lien which they have in the state where they are pronounced, but only that which the lex fori gives to them by its own laws in their character of foreign judgments."

Thompson v. Whitman, 85 U.S. 457 (18 Wall), 462-463, 21 L.Ed. 897 (1873), *quoting*, J. Story, *Conflicts of Laws*, § 609 (7th ed. 1872), *quoted in*, *Wisconsin v. Pelican Ins. Co. of New Orleans*, 127 U.S. 265, 292, 8 S.Ct. 1370, 1375, 32 L.Ed. 239 (1888), and in *Baker by Thomas, supra*, 118 S.Ct. at 668 (Scalia, J., concurring).

Perhaps even more pointedly, as Justice Scalia put it:

> It has long been recognized that "the judgment of a state Court cannot be enforced out of the state by an execution issued within it."

Id., quoting, McElmoyle ex rel. Bailey v. Cohen, 13 Pet. 312, 325, 10 L.Ed. 177 (1839). *See also* Restatement (Second) of Conflicts of Laws § 99 (1971) ("The local law of the forum determines the methods by which a judgment of another state is enforced").[3]

Petitioners have convincingly demonstrated that the opinion below reaches its result through the expedient of

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[3] Strictly, *Baker by Thomas* applies only to the situation where the judgment of one state is to be enforced in another state, and indeed this is the extent of the Constitution's Full Faith and Credit Clause. U.S. Const., art. IV, § 1. It is respectfully submitted, however, that this analysis must also embrace the situation at bar, where the judgment of a federal court is to be enforced in a state. The first Congress essentially brought the federal courts within the ambit of full faith and credit with the passage of the Full Faith and Credit Act, 28 U.S.C. § 1738.

creating a "self-executing" judgment, which finds no support in the decisions of this Court. *See Petition*, at 12-15.[4] To this, the State would add that such a species of judgment violates further the decisions of this Court, as discussed above, by its very nature, in failing to recognize the right/remedy dichotomy. A "self-executing" judgment presents no different a situation than that so forcefully disavowed by Justices Ginsburg and Scalia. Such a judgment is in reality no more than an execution, *albeit*, a "self-execution", issued by one sovereign (the United States) which that sovereign decrees must be enforced within the jurisdiction of another sovereign (Louisiana). Based upon this Court's precedents, such a decree cannot be allowed to stand.

We may state in plain terms why Louisiana's interest is concurrent with that of Petitioners: Petitioners seek a recovery precisely because the procedures mandated by Louisiana statutes for the cancellation of mortgages were not followed by parties who had obtained the right to have their mortgage cancelled. Thus, according to Louisiana law, Petitioners' mortgage was not cancelled or "in any manner affected". La. R.S. 9:5251. The federal courts have declared that the statutes embodying these procedures are meaningless and may be ignored by the parties who had obtained the right to have Petitioners' mortgage cancelled. This is unacceptable to Louisiana, and indeed should be unacceptable to any other state. Under the Court of Appeals' logic, the "self-executing" rationale need not be limited to bankruptcy courts. Virtually any federal judgment declaring the respective rights of private parties could next be deemed "self-

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[4] Indeed, this is plain from the language of the opinion itself: "At the heart of [Petitioners'] argument is the assumption that the bankruptcy court's orders were not self-executing. . . . [T]he Bank did not need to take further steps to 'execute' the bankruptcy court's orders." *Petition*, at A-12, A-15, 224 F.3d at 490-491.

executing", thus relieving litigants of following Louisiana's statutes on anything from automobile title transfer to corporate formalities.[5] This departure from the fundamental basis of federalism is as far-reaching as it is unwise.

Indeed, the *en banc* Fifth Circuit itself, a mere seventeen months prior to the decision below, enunciated the principle that a self-executing judgment would violate the right-remedy dichotomy, specifically in the context of the Bankruptcy Code, in holding that the Code did not authorize the "self-execution" of a bankruptcy order in violation of the laws of the State where enforcement is sought. In *Davis v. Davis, supra,* the Fifth Circuit dismissed out of hand the argument that judgments pursuant to the Bankruptcy Code were "literally self-executing [because in so arguing] [appellant] has confused her right with her remedy". 170 F.3d at 481. *See also Riley v. New York Trust Co.*, 315 U.S. 343, 62 S.Ct. 608, 86 L.Ed. 885, *rehearing denied*, 315 U.S. 829, 62 S.Ct. 903, 86 L.Ed. 1223 (1942); *Milwaukee County v. M. E. White Co.*, 296 U.S. 268, 56 S.Ct. 229, 80 L.Ed. 220 (1935) (holding that, at common law, a judgment of a sister state could not be enforced without the commencement of an action based thereon).

The confluence of the right/remedy dichotomy and our system of dual sovereignty is expressed in the Full Faith and Credit Clause, U.S. Const., art. IV, § 1, and the Full Faith and Credit Act, 28 U.S.C. § 1738, which essentially brings the United States and the federal court system within the ambit of Full Faith and Credit. The inherent conflicts therein have been resolved by the widespread adoption of the Uniform Enforcement of Foreign

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[5] For example, this office opined in 1993 that a foreign paternity judgment must be made executory in Louisiana before it may be used to alter State administrative records and vital statistics. Op.Atty.Gen., No. 93-554, August 13, 1993.

Judgments Act (revised 1964) ("Uniform Act").[6] A comprehensive discussion of the Uniform Act is beyond the scope of this brief, but the State feels it necessary to make the following points:

Two of the three Louisiana enforcement statutes at issue, La. R.S. 13:4241 and 13:4242, have been passed by the legislature in conformity with, and adoption of the Uniform Act, and the third, La. C.C.P. art. 2541, actually provides an even more streamlined method of enforcing a foreign judgment. The more recent, and more well-reasoned, state cases have held that the Uniform Act applies to federal judgments as well as to those of sister states. *See, e.g., Osteoimplant Technologies v. Rathe Products*, 107 Md.App. 114, 666 A.2d 1310, *cert. denied*, 341 Md. 648, 672 A.2d 623 (1995) (holding that a default money judgment awarded in federal court could not be vacated, altered or amended in state court, under full faith and credit principles). Louisiana has no judicial authority to the contrary. In this light, then, we may posit that Louisiana, by virtue of her own laws, as well as 28 U.S.C. § 1738, would have been required to give full faith and credit to the bankruptcy order (or at least the eventual judgment of the district court), had that judgment been presented to a Louisiana court for enforcement. Indeed, this principle is of ancient provenance. *See, e.g., Mills v. Duryee*, 11 U.S. (7 Cranch) 481, 484 (1813) (Storey, J.); *Hampton v. McConnell*, 16 U.S. (3 Wheat) 234, 236-237, 4 L.Ed. 378 (1818) (Marshall, C.J.). The sole point at issue here, however, is whether or not that judgment *had to be* so presented to a Louisiana court for domestication and enforcement.[7] The State respectfully submits that it did.

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[6] At all times pertinent to this matter, Louisiana had adopted the Uniform Act. *See* La. R.S. Ann. Title 13, Part III (Table) (West Supp. 2000) (including laws enacted through the 1999 Regular Session of the Louisiana legislature), La. R.S. 13:4241 to 13:4247, as added by Acts 1985, No. 464, § 1.

[7] Petitioners maintain that the bankruptcy court order may not now be enforced because the right to seek enforcement has

The opinion below essentially brushes aside the State's interest by stating, without evidence or analysis, that domestication and enforcement are unnecessary, and mere surplusage, since the items which may be raised as valid defenses at a domestication hearing, at least in this instance, were "determined by the bankruptcy court and by the district court". *Petition*, at A-13 to A-14, 224 F.3d at 490-491 (footnote omitted). In so doing, the opinion below misapprehends the very purpose of such a hearing in our system of multiple sovereignties, by ignoring the valid interest of the State in ensuring that potential defenses, as well as other issues incident to domestication, be determined by a Judge and not through the expedient – implicit in the opinion below – of casting a Parish Recorder of Mortgages in a *quasi*-judicial role by merely presenting her with a bankruptcy court order and a request to cancel the subject lien or encumbrance.[8]

It is well-settled that full faith and credit is not absolute, and that there may be valid defenses to the domestication and enforcement of a foreign judgment. For a

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expired under Louisiana law. *Petition*, at 19, n. 11. The State takes no position with respect to the merits of this contention. The State does concur, however, that this contention is one that must be decided pursuant to Louisiana law.

[8] While it is true that most of the precedents in this area, have, *per force*, dealt with the enforcement of money judgments, *Baker by Thomas, supra*, makes it clear that this principle also applies as well to the enforcement of other kinds of judgments. *See* 118 S.Ct. at 664-665 (Ginsburg, J.) ("The Court has never placed equity decrees outside the full faith and credit domain"). Justice Scalia, concurring, also makes this clear in stating that "neither the Full Faith and Credit Clause nor its implementing statute requires [the forum state] to execute the [sister-state] injunction" (118 S.Ct. at 668-669), and by relying, *inter alia*, upon *Watts v. Waddle*, 6 Pet. 389, 392, 8 L.Ed. 437 (1832) (a case involving a suit to obtain an equity decree ordering the conveyance of land, duplicating such a decree already issued in another state).

discussion of the various reasons why a foreign judgment, though entitled to full faith and credit, may validly be denied enforcement in the forum state, *see* William L. Reynolds, *The Iron Law of Full Faith and Credit*, 53 Md.L.Rev. 412 (1994). *See also Tennessee ex rel. Sizemore v. Surety Bank*, 200 F.3d 373 (5th Cir. 2000) (holding that, under the Uniform Act, a Texas bank was entitled to challenge the jurisdiction of a Tennessee court to order liquidation of an insurance company, even after Texas had issued a domestication order); Fed.R.Civ.P. 60(b)(3), which permits verdicts to be set aside if they were procured by "fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misrepresentation of an adverse party".

Similarly, Louisiana courts have denied enforcement to foreign judgments for lack of personal or subject matter jurisdiction in the rendering court, extrinsic fraud in the procurement of the judgment, satisfaction, or lack of due process in the rendering court. *See WellTech, Inc. v. Abadie*, 666 So.2d 1234 (La. App. 5th Cir.), *rehearing denied, writ denied*, 672 So.2d 690 (La. 1996), *writ denied*, 712 So.2d 864 (La. 1998). *See also Lepard v. Lepard*, 722 So.2d 367 (La. App. 2nd Cir. 1998) (holding that full faith and credit may be denied for lack of jurisdiction in the rendering court or where collateral attack would have been permitted in the jurisdiction that rendered the judgment). Louisiana's point here is that these defenses, if available and properly raised, must be heard and determined by a Louisiana court when enforcement is sought in Louisiana. One would expect this to be a routine matter in the vast majority of cases, but it is an important step which may not and must not be ignored. These issues may not be conclusively presumed to have been determined by the rendering court, as the opinion below posits is the case

for bankruptcy court orders. *Petition*, at A-13 to A-14, and n. 12; 224 F.3d at 4990-491.[9]

Finally, the foregoing, though an accurate synopsis, has perhaps been unduly emphasized here, given the context of the facts of this matter. The basic purpose of Louisiana's appearance as *amicus curiae* is to protest vigorously against the appellate court's creation of a self-executing judgment. Nevertheless, while Louisiana insists on her right not to enforce foreign judgments until they have been properly domesticated, she does not suggest that bankruptcy court orders such as the one in question would not be enforced in Louisiana. There is nothing in La. R.S. 9:5031 or 9:5251 which contemplates that such orders would not ultimately be enforced. Indeed, those statutes expressly refer the reader to the statutory provisions which constitute Louisiana's adoption of the Uniform Act. La. R.S. 13:4241 through 13:4247. *See also* La. C.C.P. art. 2541. Louisiana does insist, however, that proper supervision of her civil-law system of property holding, embodied in part by the public records doctrine, requires that the cancellation of mortgages, and the erasure of inscriptions from the public records, pursuant to a non-Louisiana judgment, be placed in the hands of a Judge, and not those of a Parish Recorder of Mortgages. The appellate court's creation of a self-executing judgment actually contemplates that a bankruptcy court may invalidate a Louisiana real property right,

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[9] Nothing in this discussion is intended to suggest that a party against whom domestication of a judgment is sought would not be precluded from re-asserting any of these issues that were actually determined by the rendering court. *See Durfee v. Duke*, 375 U.S. 106, 116, 84 S.Ct. 242, 11 L.Ed.2d 186 (1963) (noting that when the "jurisdictional issues [have] been fully and fairly litigated by the parties and finally determined . . . further litigation [is] precluded"). *See also* William L. Reynolds, *The Iron Law of Full Faith and Credit*, 54 Md.L.Rev. 412, 427-433 (1994).

which is recorded in the public records, and that Louisiana *not even need be informed*. Put simply, that is unacceptable.[10]

III. The State of Louisiana cannot accept a situation where the integrity of its public records is compromised by the entry of a bankruptcy court order.

It is simply unacceptable for a federal court to ignore, indeed to authorize non-compliance with, valid State statutory enactments unless and until those statutes have either been held to be unconstitutional or to have been preempted by the Congress. For the opinion below to do so, under the specific facts and circumstances at bar, is particularly egregious. This is so because the most potentially far-reaching effect of the opinion below is to compromise, if not destroy, the integrity of Louisiana's public records.

The Louisiana Constitution, Civil Code, and Revised Statutes, in effect, work together to create the "public records doctrine" by declaring that a variety of security and ownership interests in immovable property are ineffective against third persons in the absence of recordation, in the appropriate public records, of the documents creating or asserting those interests. *See* William V. Redmann, *The Louisiana Law of Recordation: Some Principles and Some Problems*, 39 Tul.L.Rev. 491 (1965); La. Const. art. 19, § 19 (1974); La. Civil Code art. 2266; La. R.S. 9:2721. Among the objectives of this doctrine directly pertinent here is to establish a positive force to recorded instruments, so as to allow non-parties to rely on the recorded

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[10] Moreover, it is undisputed that the mortgage in question was never actually cancelled under State law, its inscription never erased from the public records, and that it remains recorded there to this day. *Petition*, at 14, n. 7. This fact brings squarely into focus Louisiana's vital interest in the integrity of her public records. This aspect of the decision below will be discussed in the next and concluding section.

document and to be protected in acquiring rights based on those documents. *See* Lee Hargrave, *Public Records and Property Rights*, 56 La.L.Rev. 535, 537 (1996).

In Louisiana, as long as a mortgage has been validly recorded and not erased, that mortgage is conclusively presumed to exist in the eyes of the State. *See Phillips v. Parker*, 483 So.2d 972, 975 (La. 1986). The basic notion is that in creating real rights that bind property in the hands of subsequent owners, fairness requires that one give the subsequent owners an opportunity to learn from an authoritative source that the property is so bound. *See* Alejandro M. Garro, *The Louisiana Public Records Doctrine and The Civil Law Tradition*, 97-98 (1989).[11]

It is indisputable that the "public records doctrine" is absolutely basic to the Louisiana civil-law system of property holding. *See McDuffie v. Walker*, 51 So. 100 (La. 1909) (establishing the principle that Louisiana is a "record notice" jurisdiction). It follows, therefore, *a priori*, that the State of Louisiana has a vital public interest in the integrity of the public records in order to ensure, as nearly as possible, that Louisiana citizens, and indeed all persons dealing in property in Louisiana, be able to rely on the accuracy of those records. *See, e.g., Matter of De La Vergne*, 156 B.R. 773, 776 (Bkrtcy.E.D.La. 1993) (holding that all persons are conclusively presumed to have notice of the existence of all mortgages recorded on the mortgage rolls); *Amoskeag Bank v. Chagnon*, 133 N.H. 11, 572 A.2d 1153 (1990) (discussing the necessity to maintain the integrity of

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[11] Ownership of an immovable is the basic "real right", and any agreement transferring ownership of immovables is subject to the recordation rule in Louisiana. La. Civil Code, art. 517. Similarly, the right of mortgage, such as the mortgage rights underlying the instant controversy, is also a real right which the Civil Code requires to be recorded in the registry for recording mortgages. La. Civil Code, art. 3271. *See also* 1 Peter S. Title, *Louisiana Real Estate Transactions*, § 8.13, at 181 (1991).

the public records).[12] Moreover, the administration of the public records, through legislation such as the statutes involved herein, is among the ways in which Louisiana regulates the real property interests within her borders, and the right to so legislate is reserved to the State by the Tenth Amendment. *Sunderland v. United States*, 266 U.S. 226, 227, 45 S.Ct. 64, 69 L.Ed. 259 (1924) ("[t]he Tenth Amendment gives to the State the exclusive right to legislate concerning the lands within her borders . . . "); *United States v. Fox*, 94 U.S. 315, 320 (1876). *See also Clarke v. Willard*, 294 U.S. 211, 55 S.Ct. 356, 79 L.Ed. 865 (1935); *Security Trust Co. v. Dodd, Mead & Co.*, 173 U.S. 624, 19 S.Ct. 545, 43 L.Ed. 835 (1899); *Hervey v. Rhode Island Locomotive Works*, 93 U.S. (3 Otto) 664, 23 L.Ed. 1003 (1876); *Green v. Bushkirk*, 72 U.S. (5 Wall.) 307, 18 L.Ed. 599 (1866) (establishing the proposition that every state has the jurisdiction to determine for itself the nature and extent of property within its territorial limits which will be considered liable to seizure and sale under the process of its courts).

In this light, even if the panel below had engaged in a preemption analysis with respect to La. R.S. 9:5031 and 9:5251, both this Court and the Fifth Circuit, *en banc*, have made it clear that, in any such analysis, Courts must apply:

> . . . a presumption that areas of law traditionally reserved to the states, like police powers or *property law, are not to be disturbed absent the "clear and manifest purpose of Congress"*.

Davis v. Davis, supra, 170 F.3d at 482, *quoting, Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed.2d 1447 (1947) (emphasis added).

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[12] Indeed, this very principle, while particularly pertinent in the modern day to state law, may in fact be gleaned from the early jurisprudence of this Court. *See, e.g., Anthony v. Butler*, 38 U.S. (13 Pet.) 423, 10 L.Ed. 229 (1939); *Dick v. Balch*, 33 U.S. (8 Pet.) 30, 1 L.Ed. 856 (1834); *Levinz v. Will*, 1 U.S. (1 Dall.) 430, 1 L.Ed. 209 (1789); *Parker v. Wood*, 1 U.S. (1 Dall.) 436, 1 L.Ed. 212 (1789).

This presumption militates against any finding that La. R.S. 9:5031 and 9:5251 have been impliedly preempted by Congress by enacting the Bankruptcy Code. Moreover, it would seem clear that the Bankruptcy Code does not expressly preempt state laws regulating real property interests. *See Davis v. Davis, supra,* 170 F.3d at 483.

Here, we emphasize once again that La. R.S. 9:5031 and 5251 clearly mandate that no mortgage or other form of security interest in Louisiana real property may be "in any manner affected" as the result of a sale in bankruptcy, except through the domestication and enforcement in Louisiana of the bankruptcy order and judgment.[13] Particularly in light of the constitutional principles, and the fundamental importance of the public records doctrine, the appellate court should not have simply ignored the effect its ruling would have on the integrity of that doctrine. Indeed, the public records doctrine is not even addressed by the opinion below, despite extensive briefing by the parties and the State as *Amicus Curiae*. Yet, there can be no dispute that the effect of this ruling, in addition to judicially invalidating valid legislative enactments that have not been found to be unconstitutional or preempted by Congress, will be to destroy the integrity of Louisiana's public records.

Indeed, there can be little doubt that the opinion below, if allowed to stand, will have the deleterious effect we have outlined. The mortgage remains on the public records after fourteen years, and the opinion below has in effect authorized the owners of the mortgaged property to

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[13] Louisiana law also provides that a mortgage shall not be erased as the result of the discharge in bankruptcy of the mortgagor. *See Socony Mobile Oil Co. v. Burdette,* 309 So.2d 655, 656-657 (La. 1975); *Ferguson v. Porter,* 359 So.2d 676 (La. App. 1st Cir. 1978). *See also Property Asset Management v. Pirogue Cove Apts.,* 693 So.2d 1217 (La. App. 4th Cir. 1997) (holding that a mortgage, as an accessory obligation, is enforceable, whether or not the mortgagor is personally responsible for the obligation the mortgage secures).

treat it as if the mortgage did not exist. Petitioners maintain that the order of the bankruptcy court cannot now be enforced, so as to have the mortgage cancelled and its inscription removed from the public records. *See Petition*, at 19, n. 11. If Petitioners are correct, and if the opinion below is allowed to stand, then, at least in this instance, the public records of Louisiana will be demonstrably inaccurate.[14] It does not take a great leap of imagination to posit that there may be many and numerous other instances where the public records will also be rendered incorrect as the result of similar bankruptcy court orders.[15] We must therefore conclude yet again that the actual and potential harm done to vital interests of the State of Louisiana is not offset by any reciprocal federal interest in letting stand the opinion below. The State statutes involved attempt in no way to negate ultimately the order of the bankruptcy court. Indeed, La. R.S. 9:5031 and 9:5251 provide by express language that the cancellation of mortgages, and the removal of their inscription from the public records, as ordered by a bankruptcy court, may be fully accomplished through the simple expedient of domestication and enforcement of the bankruptcy order.[16] This puts

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[14] The State of Louisiana concurs in Petitioners' exposition of the various ill effects that this state of affairs will have on Louisiana's public records. *See Petition*, at 21-23. In the interest of brevity, this discussion will not be repeated here.

[15] Similarly, as discussed in the preceding section, one might imagine, and one must ponder, what other legislative enactments of the State of Louisiana may be effectively invalidated by the fiat of a bankruptcy court, or any other federal court, if the power implicit in the opinion below is allowed to stand unchecked.

[16] In the normal and anticipated circumstance, when a sale of property is ordered free and clear of liens and encumbrances, pursuant to 11 U.S.C. § 363(f)(3), the proceeds of the sale will be sufficient to satisfy all such liens and encumbrances. The lien or encumbrance then is not merely extinguished but transferred to the proceeds of the sale, and ultimately satisfied. In this

the holder of a bankruptcy judgment in no different a position than the holder of any other federal judgment, while at the same time allowing the Louisiana courts to monitor the integrity of the public records. If one were to weigh the interests advanced by Congress in the Bankruptcy Code against those of the State of Louisiana in the integrity of her public records, the scales would seem to tip decisively in Louisiana's favor.

CONCLUSION

For the reasons set forth herein, the Petition should be granted, and a Writ of Certiorari should issue to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit. Further, the decision below should be vacated, and the Louisiana statutory scheme in question should be upheld.

Respectfully submitted,

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situation the purchaser of the property may, if necessary, simply convoke a summary mandamus proceeding to procure the order of a State court that the mortgage be cancelled and that the Recorder of Mortgages erase the inscription thereof, based upon satisfaction. La. Civil Code art. 3337. Moreover, under La. R.S. 9:5385, the holder of a Mortgage note who fails to surrender the note when it is satisfied is liable for damages resulting from such failure. As far as the State is aware, however, during the seven-year course of this litigation, Respondents have advanced no claim that the subject mortgage was in fact satisfied in the bankruptcy proceeding.

(4)

No. 00-839

Supreme Court, U.S.
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In The

Supreme Court of the United States

MARY ANNA RIVET, MINNA REE WINER, EDMOND G. MIRANNE, and EDMOND G. MIRANNE, JR.;

Petitioners,

vs.

REGIONS BANK, WALTER L. BROWN, JR., PERRY S. BROWN, and FSA, L.L.C.;

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

MAY IT PLEASE THE COURT,

Petitioners, Mary Anna Rivet, Minna Ree Winer, Edmond G. Miranne, and Edmond G. Miranne, Jr., respectfully submit this Reply Brief pursuant to Supreme Court Rule 15.6.

ARGUMENT AND CITATION OF AUTHORITIES

I. Respondents do not meaningfully defend the creation of a unique self-executing judgment by the opinion below.

There can be no doubt that the opinion below holds that the bankruptcy court's order and judgment was "self-executing", as Respondents acknowledge. *Brief at 7.* Rather than defend the opinion as written, though, Respondents advance alternative arguments as to why they believe a proper result was reached and erect some straw men never advanced by Petitioners. Even if the alternative arguments advanced could be said to be correct, however, this would not change the fact that the appellate court did create a unique species of self-executing judgment, which, if the decision is allowed to stand, will enshrine forever this odd species of judicial writ, and thus endow bankruptcy courts with unwarranted power.

Respondents' core argument in favor of the "self-executing judgment" is as follows:

> Any requirement that a Section 363(f) sale order be "domesticated" through enforcement pursuant to state law procedures in order to have effect would severely undermine the federal courts' exclusive jurisdiction over bankruptcy cases and property of bankrupt estates. It would

> also seriously diminish the ability of a debtor-in-possession or trustee to sell property of the estate on favorable terms.

Brief at 8.

This argument is easily seen to be a straw man, and it makes no contribution to the debate on federalism which these facts present. Petitioners do not maintain that the *sale order* had to be domesticated in order to have effect. Petitioners do maintain that *the judgment extinguishing their mortgage* had to be domesticated and enforced, and the State of Louisiana agrees. *Amicus Brief at 6-15.* The difference is significant: Respondents suggest that Petitioners would require a bankruptcy judge to go to state court in order to give effect to his sale orders; but this is not Petitioners' argument. Instead, Petitioners maintain that the *beneficiary of the judgment* was obliged, by virtue of, *inter alia,* La. R.S. 9:5251, to effectuate his rights through the state procedure, in order to "affect" and extinguish the mortgage. By merely participating in the sale and failing to follow through in accordance with state procedure, Respondents' lawyers did only half their job; by ordering the sale the bankruptcy judge did all of his job.

As for Respondents' argument that Petitioners' position would "seriously diminish the ability of a debtor-in-possession or trustee to sell property of the estate on favorable terms", Petitioners reply: Not if the debtor-in-possession or trustee followed appropriate state procedure for the sale of real property interests. Indeed, such sales should be enhanced by prospective purchasers

gaining assurance that all federal and state procedures have been meticulously followed.[1]

II. Respondents misperceive the extent of the violence done to Louisiana public records by the opinion below.

Of the several alternative arguments put forth by Respondents, the final one is the most far-reaching of all and advances an erroneous view of the role of the Louisiana public records.[2]

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[1] It may also be noted, in passing, that the "Questions Presented", as framed by Respondents, beg the central question of the Petition. By asking whether the courts below had power to enjoin "*former* mortgage holders" from pursuing their action, Respondents would avoid the premise that, if Petitioners and the State of Louisiana are correct, Petitioners are not "former" mortgage holders – since the unexecuted bankruptcy order could not have extinguished or "in any manner affected" their mortgage rights until such procedures had been followed. La. R.S. 9:5251.

[2] As part of this argument, Respondents characterize Petitioners' position as asserting that "public record inscription creates substantive rights" *Brief at 11.* They provide no citation to the opinion below, however, because this assertion is not found in the opinion. Moreover, this assertion forms no part of Petitioners' argument, and never has done. It has never been contended by anyone, in any of the courts that have addressed this situation over some seventeen (17) years, that the Mortgage was not validly created in 1984, and validly recorded in the public records. Thus, the central, if not the sole, question now before the Louisiana courts is whether the prescriptive period, within which the still un-enforced bankruptcy order could have been enforced, has expired. If this period has expired, as Petitioners maintain, then, because of the failure to secure through enforcement the rights granted under the order, that order cannot now "in any manner" affect the otherwise valid Mortgage, pursuant to La. R.S. 9:5251. Thus, Respondents'

Respondents argue, in essence, that the record notice aspect of Louisiana's public records doctrine is not unduly infringed upon by the opinion below because there are other recorded instruments whereby a diligent prospective purchaser could inform himself of the complete facts and circumstances surrounding the continued recordation of the Mortgage. *Brief at 13-14.* Even if this argument could be said to be correct, as far as it goes,[3] it wholly misperceives the full significance of mortgage recordation under Louisiana's Civil Code and Code of Civil Procedure.

For example, an entire chapter of the Code of Civil Procedure is devoted to the distribution of proceeds resulting from judicial sales according to the rank of encumbrances, and encumbrances take their order of rank *solely* from the order of recordation. La. C.C.P. arts. 2371 through 2381. These codal provisions recognize and require – without exception for unenforced bankruptcy orders such as the one at issue herein – that such encumbrances obtain their priority of payment from the proceeds of any judicial sale *solely* from their chronological order of recordation. If the decision below is allowed to stand, not only would it render nugatory La. R.S.

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repeated argument that an invalid recordation does not *create* substantive rights (*Brief at 11-12*), while strictly true, continues to be, under the facts at bar, a *non sequitur*. Moreover, even if Petitioners were to advance such an argument, the prosecution thereof could not be enjoined under the Anti-Injunction Act because the validity, *vel non*, thereof could not have been actually litigated in the prior federal action.

[3] The State of Louisiana, through its Attorney General, as *Amicus Curiae*, has effectively put to rest any surface validity that this argument may appear to have. *Amicus Brief at 15-20.* A complete treatment of the many aspects of that doctrine is beyond the scope of this Reply Brief.

9:5251 and 9:5031, but it would also serve to make irrational the interaction of 9:5251 and 9:5031 with La. C.C.P. arts. 2371 through 2381. This Court should then anticipate, at some future time, yet another writ application because another federal court will have done violence to more state real property laws by rearranging, to suit the convenience of a bankrupt estate, the priority of payment rules contained in La. C.C.P. arts 2371 through 2381.[4]

Until such time, however, the decision below, under Respondents' restricted view of the public records doctrine, will almost inevitably lead to yet an even more absurd clash between bankruptcy court orders and Louisiana law. Under the instant injunction, Petitioners may not prosecute their mortgage foreclosure action. Yet, the Anti-Injunction Act provides no basis for any order which would actually cancel the mortgage and erase its inscription pursuant to state law. If Respondents attempt to achieve such a result under state law, Petitioners will resist, and, pursuant to La. R.S. 9:5251, respectfully submit that they will prevail. La. C.C.P. arts. 2371 through 2381 direct the sheriff to pay proceeds of any judicial sale *strictly* in order of the rank of the various encumbrances, *without exception*.

As long as Petitioners continue to re-inscribe their mortgage every ten years, there is no way for any subsequent mortgage to become senior thereto. Thus, at some future date, when the underlying property is either sold

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[4] Article 2378 grants mortgage holders the substantive right to enforce their mortgages pursuant to La. C.C.P. arts. 3271 through 3743. In fact it was pursuant to these articles that the mortgage enforcement action under injunction herein was commenced, because the Mortgage was (1) of record (*i.e.*, not cancelled), (2) superior in rank as recorded, and (3) not paid when the 1993 sale was consummated.

or foreclosed upon by a junior lien holder, Petitioners should be able to insist under state law on the payment of their mortgage first. Thus, Respondents' superficial and constricted view of the public records doctrine in fact does nothing to ameliorate the deleterious effects of the decision below on Louisiana property law, including the public records doctrine. Petitioners submit that the Attorney General of Louisiana is quite correct when he suggests that there is nothing actually in the Bankruptcy Code, and no interest advanced by Congress in enacting the Bankruptcy Code, which either does or should supercede the interest "of the State of Louisiana in the integrity of her public records." *Amicus Brief at 20.*

III. Respondents misapprehend the effect of an expired judgment.

As part of their attempt to obfuscate the central issue of the creation of a "self-executing" judgment, Respondents argue that the opinion below "does not enforce the bankruptcy court orders, but merely recognizes their preclusive effect". *Brief at 5-6.* As part of this argument they state that, if a "money judgment is never enforced through execution, it will still have preclusive effect between the litigants as to all issues and claims that were litigated". *Id. at 5 (footnote omitted).* This evidences a clear misunderstanding of the law of judgments.

A judgment declares the rights of the parties and gives rise to the concomitant right to secure the fruits of that judgment through the remedy of enforcement in accordance with the law of the jurisdiction in which enforcement is sought. *See, e.g.*, Henry Campbell Black, *A Treatise on the Law of Judgments, including the Doctrine of Res Judicata*, Chap. 1, § 5 at 8-9 (West 1891) ("Enforcement

is not an integral part of the judgment. The judgment is merely the affirmation of a liability. The right to use the process of the court for its enforcement is a consequence which the law attaches to it"); I Edward W. Tuttle, *A Treatise on the Law of Judgments*, § 4 at 6-7 (Bancroft-Whitney 5th ed. 1925) ("The law provides the means of enforcing judgments. No court has authority to assume legislative powers by providing other means").

It is well-settled in all American jurisdictions, however, that, once a judgment has expired, it can no longer be enforced. *See, e.g.*, Note, *Judgments-Executions-Statutes of Limitations*, 22 No.Caro.L.Rev. 146 (1944). Thus, in any post-expiration execution or suit to enforce a judgment, and secure the rights granted thereby, the expired judgment can provide no basis for securing the rights granted thereunder. Neither *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 148, 108 S.Ct. 1684, 100 L.Ed.2d 127 (1988) nor *Baker by Thomas v. General Motors*, ___ U.S. ___, 118 S.Ct. 657 (1998), dealt with expired judgments, thus Respondents' reliance on these cases for this aspect of their argument is misplaced. The more appropriate case to look to here is *United States v. Fiorella*, 869 F.2d 1425, 1426 (11th Cir. 1989), holding that a federal judgment may not be enforced, and thus not revived, beyond that period of time provided by the law of the state in which enforcement is sought.

Petitioners submit that the expiration, *vel non*, of the bankruptcy order in question may not properly be the subject of an Anti-Injunction Act injunction because the fact of non-enforcement, the state-law expiration period, and the effects of non-enforcement, could not have been actually litigated in the prior federal proceeding that forms the only basis of federal jurisdiction under the Act. Louisiana law mandates that Petitioners' Mortgage can

not be "in any manner affected" by the bankruptcy court's order until that order has been domesticated and enforced in Louisiana. La. R.S. 9:5251; *Amicus Brief at 6*. Respondents have not enforced their judgment in some fifteen (15) years. If Louisiana courts now decide that the period within which to enforce that judgment has expired under Louisiana law, then the judgment cannot be enforced, and, by logical extension can no longer provide any basis for extinguishing Petitioners' Mortgage.

IV. Respondents misstate the analytical basis of the opinion below.

Respondents argue that the opinion below avoids a "constitutional preemption issue through its reasoned conclusion that the state statutes at issue do not apply to the bankruptcy court orders." *Brief at 9*. Respondents go on to argue that this is so because it was the bankruptcy court order which extinguished the lien, while the state statutes apply only to bankruptcy sales. *Brief at 9-11*. This supposed "reasoned conclusion" by the Fifth Circuit panel does not exist; rather Respondents are here supplying legal analysis the circuit court did not itself choose to utilize. Moreover, the distinction suggested by Respondents would be frivolous, in light of the law applicable to sale orders pursuant to 11 U.S.C. § 363(f).[5]

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[5] Respondents are simply wrong in asserting that the plain language of La. R.S. 9:5251 and 9:5031 does not require that a bankruptcy judgment be domesticated in order to affect mortgage rights in Louisiana. This point is addressed in the Petition at 19-26, and in the Attorney General's *Amicus* Brief at 6-15. Moreover, the fact that La. R.S. 13:4204 permits the recordation of a federal judgment to create a judicial mortgage is irrelevant to the specific provisions of 9:5251 and 9:5031, which deal only with the effects of bankruptcy sale orders on

It is well-settled that any sale of property of the bankrupt estate must be done strictly pursuant to § 363(f), or the sale will be subject to all liens and encumbrances. In *In re Cutaia*, 206 B.R. 250 (Bkrtcy. S.D. Fla. 1997), for example, a sale of property was held to be subject to liens and encumbrances because the trustee had not procured an order authorizing the sale. 206 B.R. at 252. *See also In re Parish*, 171 B.R. 138, 140 (Bkrtcy. M.D. Fla. 1994). In this light it is frivolous for Respondents to posit that La. R.S. 9:5251 and 9:5031 were intended by the legislature to apply only to bankruptcy sales and not bankruptcy sales pursuant to bankruptcy orders. It is particularly frivolous to posit that the opinion below should be affirmed on the basis of this distinction when the opinion itself does not make the distinction.[6] What

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existing mortgages created under state law. *Brief at 10.* Finally, La. Civ. Code Art. 3337 does not "mention . . . a requirement for state court 'domestication' of a foreign judgment" (*Id.*), because, as ¶ (b) of the 1992 Revision Comments makes implicitly clear, the term "judgment", as used in Art. 3337(4), refers to a judgment resulting from a suit under Louisiana law and issued by a Louisiana Court. *See also* Ralph Slovenko, *Treatise on Creditor's Rights Under Louisiana Civil Law*, Part V, Chap. 2, § 2 at 777-778 (Claitor's 1968).

[6] Respondents' reliance on *Matter of United States Brass Corp.*, 110 F.3d 1261, 1268 (7th Cir. 1997) (*Brief at 7*) is difficult to fathom. That case stands for the proposition that a bankruptcy court has exclusive jurisdiction over the property of a bankruptcy estate. No one questions that the bankruptcy court had the jurisdiction to issue the order it did. The issue here is whether that order is "self-executing" in the face of the Louisiana statutes in question, or whether that order had to be domesticated and enforced, in accordance with those statutes, in order to secure the rights it afforded. *Matter of United States Brass Corp.* does not address these issues in any way.

cannot be denied about the opinion below, and the central point on which it must ultimately be vacated, is its creation of a "self-executing" judgment. *See Section "I", supra.* The Attorney General addresses this point particularly well:

> A "self-executing" judgment . . . is in reality no more than an execution, *albeit*, a "self-execution", issued by one sovereign (the United States) which that sovereign decrees must be enforced within the jurisdiction of another sovereign (Louisiana). Based upon this Court's precedents, such a decree cannot be allowed to stand.

Amicus Brief at 9.

CONCLUSION

For the reasons set forth herein, and in the Petition for a Writ of *Certiorari*, a Writ of Certiorari should issue to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit.

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